Supreme Court, U.S.
FILED

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No.----------

In The
Supreme Court of the United States
October Term, 2000

Dilip K. Paul
Petitioner
v.
U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION
and DAVID FREDLEY, SAM HOTCHKISS, FREDRICK MULLIN, BOB RANDOLPH, ROBERT E. THOMPSON, RICH HARTY, NORMAN DAY, HILTON CASS, SYLVIA ARBELBIDE, DAN GLICKMAN, Secretary of Agriculture, UNITED STATES OF AMERICA, MIKE DOMBECK, Chief, Forest Service
Respondants

Petition For Writ Of Certiorari
The United States Court Of Appeals
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. When the district court erroneously thought that it has ruled on a number of pending issues, but in fact, it did not rule in those issues, and ruled on other issues, and petitioner was waiting for the district court to rule on those issues it left undecided, **to have its decision final**, DID THIS WAITING FOR RULING ON THE UNDECIDED ISSUES RAN PETITIONER'S TIME OF APPEAL.

2. When multiple claims are presented and when the district court, out of errors, failed to make ***"an express determination that there is no just reason for delay"***, as required under FRCP 54(b) and under 28 USC § 1291, while ruling on ***"fewer than all of the claims"***; is the time of appeal starts to run from the date of that ruling?

3. The district court stated in **Appendix -10 at 34-35**, that it needed to rule on the appropriateness of plaintiff's filing his qui tam complaints, in camera under seal, as required by 31 USC § 3730(b)(1), because some of the claims may not be filed by the qui tam plaintiff due to the prohibition under 31 USC § 3730(e)(3). The court then (a) ***erroneously*** barred plaintiff's some of the claims ***against some of the defendants*** which cannot be barred under § 3730(e)(3) [**see Appendix 10 at 39**]; (b) erroneously did not rule on ***all of the claims against some of the other defendants which could not be barred under § 3730***(e)(3); the plaintiff then filed motions under FRCP 59(a) for rehearing and the court never ruled on the motions. **Further the court has no authority to dismiss plaintiff's qui tam complaints on claims against some or all of the defendants, which are not specifically barred by § 3730(e)(3)**. See 31 USC § 3730(b)(1).

(a) Do these motions filed under FRCP 59(a) for rehearing create issues which needed to be resolved by the district court **prior to its decision becomes final** and

(1) the appeal court can have jurisdiction on the appeal when the district court's decision was not final, under FRCP 54(b), and under 28 USC § 1291?

(2) plaintiff's appeal time on other issues starts to run?

(b) Does the district court require to notify/serve with the orders on qui tam plaintiff about the fate of his motions as requre under FRCP 5 (a), prior to his time of appeal on other issues starts to run?

(c) The resolution of the qui tam claims against the Forest Service employees have direct bearing on plaintiff's other claims. Can plaintiff's appeal time starts to run on him when his motions on qui tam claims were pending in the district court.

(d) Do the rulings of the district court and appeal court's rulings in this case comply with (1) a number of this court's settled decisions (2) the due process requirements of the Fifth Amendment of the Constitution on plaintiff's liberty and property; and (3) the equal protection clause of the Fourteenth Amendment of the Constitution on his liberty and property rights with regards to petitioner's state law tort claims?

4. In **Appendix 3**, the district Court stated that Under FRCP 15(a), plaintiff needed the leave of the court to file an amended qui tam complaint, filed under seal. **The court's construction and ruling on the issue is erroneous. Petitioner did not file for leave of the court to file any amended qui tam complaints, but he filed two motions under FRCP 59(a) for rehearing on the two qui tam**

complaints. Did petitioner's time of appeal starts to run on other issues when he was waiting for the court to rule on his *prior filed* two motions.

5. Are the Federal employees protected under the False Claims Act, 31 USC § 3730(h)? Or the Civil Service Reform Act (CSRA) precludes Federal employees from pressing claims under section § 3730(h), even when the Special Counsel denied petitioner coverage under the CSRA?

6. Is the petitioner's Privacy Act claim time barred?

7. Did the petitioner stated a claim under Title VII?

8. Can the petitioner, as a civil servant, press his Bivens claims for constitutional torts? Or the Civil Service Reform Act (CSRA) precludes Federal employees from pressing constitutional tort claims, even when the Special Counsel denied petitioner coverage under the CSRA?

9. Does the plaintiff stated claims under the State law torts?

10. Is the district court's characterization of petitioner's common law tort claims of Invasion of Privacy & Intentional Infliction of Mental Distress are the same as defamation and slander & their dismissal of the claims proper under the Federal Tort Claims Act, 28 USC § 2680(h)?

LIST OF INTERESTED PARTIES

The following is a complete list of all parties with an interest of this litigation. There are no known parent or subsidiary companies which are required to be listed.

1. Dilip K. Paul - Petitioner

2. United States Of America - Unserved Petitioner
ex. rel. Dilip K. Paul (in qui tam complaints)

3. United States District Court for the Northern District of California, San Francisco Division - Respondent
4. David Fredley- Respondant *
5. Sam Hotchkiss - Respondent*
6. Frederick Mullin - Respondent*
7. Bob Randolph - Respondent*
8. Robert E. Thompson - Respondent*
9. Rich Harty - Respondent*
10. Norman Day - Respondent*
11. Hilton Cass - Respondent*
12. Sylvia Arbelbide - Respondent*
13. USDA-Forest Service - Respondent
14. Dan Glickman, Secretary, USDA - Respondent
15. United States of America - Respondent in non-qui tam cases.
16. Mike Dombeck, Chief, USDA-Forest Service - Respondent.
17. Gail Killefer, Counsel for the Respondents
18. United States Pumice Company- respondent in a *qui tam* case- unserved.
19. George Burton- respondent in a *qui tam* case- unserved.
20. Solicitor General of the United States

* Respondants no. 4 through 12 are Forest Service employees. They are defendants in qui tam cases as well as in tort claims cases

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit are reprinted in the **Appendix 1 & 2.** Those opinions stated that it had no jurisdiction over the January 27, 1998 decision of the United States District Court of the Northern District of California, San Francisco Division. Petitioner stated that the decision of January 27, 1998, is only a **partial one**, because a number of petitioner's **prior filed** motions & issues remained unresolved and pending in that court when it issued the said ruling. Petitioner was waiting for the district court to resolve the pending motions & issues prior to filing of the notice of appeal. The district court finally ruled on the pending motions & issues on August 27, 1998, (reprinted in **Appendix-3**). But again, it made errors as to **which motions & what kind of motions** were pending. The notice of appeal was filed on September 25, 1998. The Ninth Circuit, relying on the district court's erroneous ruling, stated that the notice of the appeal was not filed timely and it has no jurisdiction over the appeal. The appeal court rejected petitioner's argument that all the pending motions and issues affecting **all parties** have to be resolved by the district court prior to the filing of the notice of appeal, **and only after that**, the appeal court can have jurisdiction over the appeal as per the requirement of **FRCP 54(b), and 28 USC § 1291** The District Court issued a number partial decisions in the case which are reprinted in **Appendices 3 through 10.**

JURISDICTION OF THIS COURT

1 The United States District Court Of Northern District Of California, San Francisco Division had exclusive jurisdiction to try this case under the Fifth Amendment of the United States Constitution, 31 U.S.C. § 3730(b)(2), under § 3730(h), under 28 U.S.C. §§ 2671-2680, 42 U.S.C §§ 1981-1988, 42 U.S.C § 2000e-16, 5 U.S.C § 552a, under California States Codes §§ 43, 44, 45 & 46.

The U.S. District Court also had the exclusive jurisdiction under 28 U.S.C. §§ 1331, 1332, 1345, 1355, 1357 and 1407. The United States Court of Appeals for the Ninth Circuit had jurisdiction over the matter pursuant to 28 U.S.C. § 1291. The ruling of that Court (Appendix 2) was issued on July 11, 2000. Petitioner filed for rehearing on July 17, 2000. The appeal court's final ruling (Appendix 1) was entered on August 23, 2000. The petition for a writ of certiorari is filed timely and jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1)

CONSTITUTIONAL PROVISION, STATUTES, REGULATIONS

United States Constitution, Fifth Amendment.
United States False Claims Act, 31 USC §§ 3729 et seq.
Federal Rules Of Civil Procedure 54(b), 59, 15(a), 5(a).
Federal Tort Claims Act 28 USC §§ 2671-2680
Title VII of the Civil rights Act of 1964, 42 USC § 2000e_16
Courts of Appeals, Final decisions, 28 USC § 1291

STATEMENT OF THE CASE

(a) Issues related to unresolved qui tam complaints.

Petitioner filed two qui tam complaints filed in camera, UNDER SEAL on June 14, 1996, with the clerk of the court, as allowed under **31 USC § 3730(b)(2), [See Appendix-13 at p-55]**

(1) The First qui tam case was filed under the caption:

UNITED STATES OF AMERICA
ex. rel . Dilip K. Paul
Plaintiffs
v.

David Fredley, Sam Hotchkiss, Fredric Mullin, Bob Randolph, Robert J. Thompson, Rich Harty, Norman Day, Hilton Cass, Sylvia Arbelbide, and UNITED STATES PUMICE COMPANY

Defendants.

(2) The Second qui tam lawsuit was filed under the caption

UNITED STATES OF AMERICA
ex. rel. Dilip K. Paul

Plaintiffs

v.

David Fredley, Sam Hotchkiss, Fredric Mullin, Bob Randolph, Robert J. Thompson, Rich Harty, Norman day, Hilton Cass, Sylvia Arbelbide, and George Burton of the Burton Sand and Gravel Company.

Defendants.

Petitioner had 120 days from the date of filing (i. e. until October 12, 1996) to serve on the Government as per Federal Rule of Civil Procedure (FRCP) 4(j).

Upon received of the two sealed qui tam complaints, the clerk did not file these pending court's evaluation of the propriety of such an action. **(See Appendix 10 at 34-35)**. The court did not open the sealed complaints, did not examine the contents, made an error as to how many qui tam complaints were filed. The court thought only one complaints was filed and there was only one defendant. But, in fact, two sealed qui tam complaints were filed and there were multiple defendants.

The court completely erred on ruling of the other qui tam complaint **[See below discussion on U. S. Pumice Co. case]** on all claims against all defendants. However, the court presumed that it has ruled on all the claims against all the

defendants. These errors resulted due to the court's ruling on the cases without ever opening the sealed envelopes, filed in camera.

There were multiple defendants in the Burton case. The court dismissed qui tam claims against only one of the codefendant, George Burton, the mining claimant, **but did not rule on the other codefendants, i. e., the named Forest Service employees. (See Appendix 10 at 39-40).**

Further, **in Appendix 10 at 41 under III, the court ORDERED**
(1) The clerk is INSTRUCTED to file plaintiff's False Claims Act complaint.

This part of the order contradicted the court's dismissal of petitioner's qui tam claim against Burton, and then instructing the clerk to file the complaint. Petitioner noticed the court's errors.

Upon noticing the errors, petitioner, within 10 days of said ruling, filed two motions, under FRCP 59, in camera **UNDER SEAL,** showing that there were factual and legal errors in the judge's ruling and the cases should be reheard, and qui tam plaintiff should be allowed to serve the cases on the Government, as per 31 USC § 3730(b)(2).

These motions had to be filed in camera, under seal at stage of proceeding in compliance with 31 USC § 3730(b)(2), because these discussed substantial issues. If these motions are filed in open court, the qui tam complaints could be dismissed with prejudice for not complying with the said § 3730(b)(2); see U.S. ex rel Pilon v. Martin Marieta Corp., C.A. 2 (N.Y.) 1995, 60 F.3d 995.

The district court, however, due to error, **did not open, read or ruled on these motions at any time.** Petitioner filed

motions on April 20, 1998, under FRCP 60(a), pointing out that petitioner's prior filed motions were pending and awaiting court's ruling. **Petitioner specifically mentioned in the motion that his motions of 9/16/1996 and of 1/20/1998 remained unresolved or unaddressed. The court did not mention about those motions on its 8/27/1998 ruling. (See Appendix -3).** It discussed about different pleadings which are not relevant here. The court again did not open the prior filed sealed motions, but **made erroneous reference to other motions** dealing with other issues, against other defendants. As a result, the court made errors in the case in its ruling on the August 27, 1998. **See Appendix-3**

In the U. S. Pumice case, petitioner showed in his FRCP 59 motion that

(a) U. S Pumice Company has 83 associate placer mining claims , comprising 6,480 acres of federal lands, against the U.S, **out of which there is a litigation in the U. S. District Court in Sacramento, involving only 13 mining claims comprising 1,214.125 acres of lands, and these 13 mining claims may be barred under 31 USC § 3730(e)(3).** [1] **But** there is absolutely no restriction in proceeding with the remaining 70 associate placer mining claims against U. S. Pumice Co. in the instant action pending in the district court.

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[1] On October 26, 2000, petitioner learnt that codefendants Hilton Cass and U.S. Pumice Company reached an agreement to withdraw the case from the Sacramento court and to settle the Government's claims between themselves. In that case, petitioner's qui tam complaints on **all claims** could proceed.

Further, Petitioner showed that the basis of the Government's contention in the U. S district court in Sacramento was petitioner's own disclosure made in 1989.

(b) Petitioner's qui tam complaint against U. S Pumice Company for removal of more than $60 million dollars worth of minerals from the claimed federal lands for which there is no case pending anywhere. So there is no restriction to proceed with those claims, and the court must allow those claims to proceed.

(c) **There is also no lawsuit pending against the other defendants (who are U. S. Forest Service employees) in any court, and** §3730(e)(3) will not bar petitioner to proceed with his qui tam complaint **for all the claims** against these defendants. Petitioner also pointed out that the qui tam complaint against these Forest Service employees cannot be dismissed by the court because it lacks authority to do so.

This is because of 31 USC § 3730(b)(2), which states, **"The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting"**

In the Burton case, petitioner showed in his FRCP 59 motion that
(a) the Burton Case was in the Bureau of Land Management (BLM)'s mining claims validity adjudication proceedings, which is not "an administrative civil money penalty proceeding" to be barred under 31 USC § 3730(e)(3).

Petitioner also pointed out that the court has no authority to dismiss the case at this stage, and should rehear the case.

(b) **petitioner also filed documentary evidence in camera UNDER SEAL, showing that Burton's case was no longer**

under BLM's mining claims validity adjudication proceeding or under any litigation anywhere at that time; and codefendants Hilton Cass and Burton had reached an agreement to get the mining claims to be patented, and the court should let the case proceed,

(c) **petitioner also contended in his motion that there is no case pending anywhere against the other defendants (who are the named Forest Service employees), and** the court has no authority dismiss the case at this point of the proceeding, See 31 USC § 3730 (b)(2).

As the two motions are filed under FRCP 59, the court was required to consider the motion and **notify petitioner the outcome of his motion**, as required under FRCP 5(a). The court did **not** rule and notify petitioner as to the outcome of his motions.

Further, these motions created issues which were required to be resolved by the district court **prior to its jurisdiction on the case could be terminated** and prior to petitioner could file a notice of appeal and **the appeal court could have jurisdiction on the case**. See FRCP 54(b), & 28 USC § 1291[**§ 1291 is reprinted under Appendix 14 on p-55]**

Again on 1/20/1998, petitioner filed two motions **under FRCP 59,** in camera under seal, reminding the court to rule on his prior filed motions **under FRCP 59** on his pending qui tam complaints. The district court did not rule on these two motions when it issued the judgment on 1/27/1998. **[See Appendix 4, 5 & 6]. So these issues were pending in the district court and it retained jurisdiction on the case.**

There is absolutely no basis of the district court's presumption (see Appendix-3) that petitioner has filed amended qui tam complaints under FRCP 15(a), which

required plaintiff to seek court's leave to file a motion to the court to rule on the pending qui tam cases. This presumption is based on errors of ruling on the cases without ever opening the sealed cases filed in camera.

The district court made repeated errors in differentiating qui tam claims under 31 USC § 3730(b)(2), from the tort claims under § 3730(h). Both types of claims were pending in the court. The district court thought it has ruled on claims under § 3730(b)(2). But in fact, it has ruled on claim under § 3730(h). This has added to the present confusion.

Petitioner's qui tam claims and his tort claim filed under 31USC § 3730 (h) are **dependant on each other.** In order to file claims under § 3730(h) claims, petitioner is required to file qui tam complaints under § 3730(b)(2), See Casarez v Delco Systems Operations (1993, CD Cal) 8BNA IER Cas 618.

For this reason, the district court could not terminate the proceeding without ruling on the qui tam complaints. For these reasons, it retained jurisdiction, when it issued ruling on 1/27/1998.

(b) The district court erred in ruling on non qui tam claims.

Petitioner has named the Forest Service employees as defendants for violating his protected rights under the Fifth Amendment of the Constitution, for violation of his rights guaranteed under the California State laws and for conspiracy to defraud the United States. As a result, the Attorney General's certification, submitted under 28 USC § 2679(d)(1), would not protect them from plaintiff's claims under 28 USC § 2679(d)(2)(a) and (b), which the District Court ruled that it did. **(See Appendix-8, under VI at 27-29).** The propriety of Attorney General's Certification can be reviewable by the Appeals court, which could not be done in this case as the Appeals court ruled that the appeal was not filed timely, **(see Appendix-2).**

As a result of accepting Attorney General's certification, and due to numerous other errors, the district court erroneously dismissed a number of petitioner's valid tort claims against the named Forest Service employees.

The district court erroneously dismissed petitioner's claims under 31 USC § 3730(h), and his claims for violation of his constitutional rights by erroneously holding that the Civil Service Reform Act (CSRA) precludes petitioner to press those claims. On the other hand, petitioner was denied coverage by the Office of the Special Counsel under the CSRA. These left petitioner without any recourse for violation of his protect rights.

The district court also erroneously dismissed petitioner's Title VII claim by disregarding the submitted evidence and by disregarding the arguments petitioner put forward.

The Ninth Circuit Court's ruling **[see Appendix 2 at 3]** stated that plaintiff's claims on his violation of various rights is appealable. The appeals court did not mention about petitioner's dependant QUI TAM claims, and related motions, which were pending in the district court over which that court was yet to rule. The appeals court stated that,

"Paul's contention that the judgment was not final lacks merit because it was clear that the district court had resolved all issues necessary to establish the legal rights and duties of the parties. [citation]. Accordingly, the district court properly denied Paul's motion for reconsideration. [citation]".

The appeals court's this holding is erroneous, which has been based on the district court's erroneous ruling. The district court resolved only the petitioner's tort, civil rights, Constitutional & privacy claims related issues, but did not

rule on his qui tam claims related issues. The qui tam claims related actions were at the heart of his tort claims, remained unresolved. The United States rights in two False Claims Act actions remained unresolved, and the Government was not even served with the process, because the district court stated to examine the propriety of such actions, which it mistakenly did not do. The liabilities of the named Forest Service employees to the United States and to petitioner in two qui tam actions remained unresolved. The liabilities of U. S. Pumice company to the United States under the False Claims Act remained unresolved. The liabilities of George Burton to the United States remained unresolved. All of these issues remained unresolved because of the errors of the district court. For these reasons, district court's ruling of 1/27/98 is not a **final** one. That is why the appeal court will not have jurisdiction over this ruling, which requires a **final** decision. **see 28 USC § 1291**. So the appeal court's holding and the citations are misplaced. This ruling of the appeals court violated petitioner's due process rights guaranteed under the Fifth Amendments of the Constitution of the United States, as it did not comply with the, (1) Federal Rules of Civil Procedures, (2) 28 USC § 1291, Appellate jurisdiction based on **final** decision of the district courts. (3) Federal Rules of Appeal Procedures (4) petitioner's rights under the False Claims Act, 31 USC § 3730(b)(2), (5) Case laws of the Supreme Court, because the appeals court relied on the erroneous rulings of the district court, and due to its failure to address the issues arose as a result of the errors made by that court.

There is another error made by the district court in its order of August 27, 1998 **[See Appendix -3 at 5], when it stated,**

" On June 2, 1997, Paul attempted to file another amended complaint. Apparently, Paul later realized that he could not file this amended complaint without leave of the court. See FRCP 15. On July 22, 1997, Paul filed a

motion for leave to amend his complaint. The court never granted the motion. As a result, Paul never actually filed an amended complaint."

The motions referred to by the court **DID NOT DEAL WITH THE FILED SEALED QUI TAM COMPLAINTS.** So there was no attempt to amend the qui tam complaints. The question of FRCP 15(a) did not arise with reference to petitioner's § 3730(b)(2) qui tam complaints.

The motion of June 22, 1997 **(referred to in Appendix-3 at 5)**, deal with plaintiff's **Title VII** case, where he filed to amend his claim to replace the name of the Chief of the Forest Service, Mike Dombeck with that of the Secretary of the Agriculture, Mr. Dan Glickman, as the proper defendant.

The motion of July 22, 1997 **(referred to in Appendix-3 at 5)**, deal with plaintiff's **common law tort claims of (1) Intentional Infliction of Mental distress, and for (2) violation of his Privacy Rights. Granting of these motions by the district court have no relevance to petitioner's qui tam complaints and these did not affect the issue of the date of appealability of his case.**
Although the court separately did not grant the leave on these motions, the January 27, 1998 ruling **[See Appendix -6 , under C & D, at 15-17]** indicate the court has taken the contents of these motions into account in its ruling.

The district court's holding of August 27, 1998 **[Appendix - 3 at 5] is erroneous.** Petitioner did not file any motion for leave to file any amended qui tam complaint(s). This error has, in turn, led to the appeal court's erroneous ruling that petitioner's notice of appeal was untimely.

28 USC § 1291 and FRCP 54(b) would not allow petitioner to file the appeal until the district court has ruled on **all** of the pending issues in that court, which have affected all of the litigants to have its decision **final.** That is why Petitioner filed the appeal timely and the appeal court's holding is erroneous.

For the foregoing, the appeals court's ruling on its jurisdiction on the petitioner's appeal, without verifying the facts of the case, have violated petitioner's due process rights, as it was arbitrary, capricious, erroneous and against the evidence on record.

REASONS FOR ALLOWANCE OF THE WRIT

Summary of Arguments

The erroneous ruling of the Ninth Circuit Court of Appeals based on the erroneous ruling of the district court has violated petitioner's due process rights and the rights of the United States, which is defrauded by the mining claimants in collusion with the named Forest Service employees, who are named as codefendants in two separate qui tam complaints. The 1986 amendment of the False Claims Act, 31 USC § 3729 et seq., created the qui tam rights, which allows an individual to bring suits on behalf of the United States. There is no provision in the amended False Claims Act for a district court to examine the qui tam complaint and determine whether it is appropriate to serve the process on the Government. The service on the Government is required under 31 USC § 3730(b)(2) **[See Appendix-13**]. In the instant case, district court, in violation of the due process and in violation of the above law, decided to determine the appropriateness of petitioner's bringing the qui tam case. However, it did not determine the promised appropriateness in one case **[in U. S. Pumice case]**, and in the other case **[in Burton's case]**, ruled only on claim against one defendant, and did not rule on the claims against the other defendants at

all. The factual situation changed in Burton's case in the mean time, and the fact was brought before the court, which did not rule on the case at that time. As a result, the district court did not allow petitioner to proceed with his qui tam claims. The court made ruling later on stating that it did rule on the cases, which in fact, it did not. The district court stated in **Appendix-3** that it had ruled on the qui tam cases in **Appendix- 9**, where, in fact, it did not rule on the qui tam cases, filed under 31 USC § 3730(b)(2). Petitioner could not file the appeal until all the issues are resolved in the district court to have its decision **final.** This is because the appeal court will not have jurisdiction on the appeal. See 28 USC § 1291 and FRCP 54(b). But the appeals court ruled otherwise based on the errors of the district court. Nowhere in the record, the district court has ruled on all of the issues raised in the two qui tam complaints against all of the defendants. The records of the district court's rulings are printed through **Appendix- 3 through Appendix -12**. Due to the erroneous rulings, petitioner was not given any clear cut choice as to when to file an appeal and at what point the appeal court will have jurisdiction on the appeal. These erroneous rulings have violated petitioner's due process rights, guaranteed under the Fifth Amendment of the Constitution. The appeal court's rulings directly violated this court's holding on these issues.

The district court made many other errors in its ruling which require appellate review. More importantly, without appellate review petitioner's qui tam claims can become res judicata, without any fault of his own, and due to the errors of the district court. In that case, plaintiff's due process rights will be violated.
The United States, in that case, will not be able to bring justice to cases where unscrupulous defendants have defrauded it and unlawfully caused damaged to it for an amount of more than a billion dollars. The named Forest Service employee defendants are still defrauding the

Government, where there is a legal remedy. For these reasons a writ of certiorari should be granted.

ARGUMENTS

A Number of Important Questions of First Impression Before This Court.

1. Arguments under Question No. 1.

The district court made a number of errors with regard petitioner's qui tam complaints. The district clerk received the sealed qui tam complaints, **"but has not filed it, under seal or otherwise, pending the court's evaluation of the propriety of such an action." [See Appendix 10 at 35].** There are two qui tam complaints filed by petitioner in camera, under seal. But the court indicated that only one was received by the clerk. Petitioner has no idea about what has happened to the other qui tam complaint. Later on in the same ruling the court dismissed the qui tam complaint **[Burton's case]**, against Burton. The court did not rule on the other qui tam complaint. Petitioner filed two motions under FRCP 59(a) for rehearing of the two qui tam complaints, on which the court has never ruled. Obviously, these issues remained pending when the court issued its judgment on January 27, 1998. **[See Appendix 4, 5 & 6].**

Under due process of law, the court should have never stopped petitioner from serving the process on the Government, as per 31 USC § 3730(b)(2). If any claim against any defendant could not be brought due to the prohibition of 31 USC § 3730(e)(3) **[see Appendix 10 at 39]**, that claim against that defendant could have been excluded later on. The remaining claims against the remaining defendants should have been allowed to proceed. Prior to serving the process, the court has no authority to dismiss

those claims. [See 31 USC § 3730(b)(1)]. By not allowing to proceed with petitioner's qui tam complaints, even prior to serving on the Government, petitioner's due process rights were denied.

Petitioner's due process rights were further denied when his FRCP 59(a) motions were not acted upon and not ruled on. The court then entered the judgment on other issues on January 27, 1998, leaving his qui tam complaints related issues crying for resolution. Petitioner then filed a motion under FRCP 60 on April 20, 1998, requesting the court to rule on the pending issues and motions, about which the court erroneously misconstrued, and erroneously ruled on 8/27/1998. **(See Appendix-3).**

Further, the two qui tam complaints, brought in the name of the United States, are the main complaints upon which petitioner's tortious and other injuries related claims are based. The district court did not rule on the motions related to the main issues of the qui tam complaints, and dealt mainly on the other issues. The other issues arose as a result of defendants' tortious acts on the petitioner while they were defrauding the United States. The other issues are dependant on the qui tam complaints related issues. The court cannot objectively ruled on the other issues without considering the issues related to the qui tam complaints. Because the claims are dependent on each other, and the January 27, 1998 ruling dealt only with the dependent claims, is not the **final** decision, it is not appealable. **This is because the district court retained jurisdiction and could reverse its earlier decision.**

Upon appeal, within 30 day's of district court's erroneous ruling **[see Appendix-3]**, the appeal court, based on the district court's errors, ruled that petitioner's time for appeal ran out and it had no jurisdiction on his appeal, again denying petitioner's due process rights.

As per FRCP 54(b) and 28 USC § 1291, petitioner could not have filed appeal when the issues and two motions related to his two qui tam complaints were pending in the district court, awaiting ruling, and **the district retained jurisdiction in the case.**

The appeals court's holding is erroneous, because it did not have appellate jurisdiction, as per 28 USC § 1291 on the case after the district court's January 27, 1998 judgment **[See Appendix 4, 5 & 6**]. This is because both the district court and the appeals cannot have simultaneous jurisdiction over the same issue in the same case at the same time, and FRCP 54(b) prohibits filing such appeal.

2. **Arguments under question no. 2**

In **Appendix-6 at 17, under III,** the district court stated,

'Because this eliminates all of Paul's claims, the clerk is directed to enter judgment in favor of the defendants'.

For appealability, this ruling did not comply with the requirements of FRCP 54(b) 28 USC § 1291. Petitioner had two qui tam complaints pending, which were brought in **the name of the United States.** Petitioner had **four motions, filed under FRCP 59, pending** in the court which dealt with the qui tam complaints and the court was required to notify petitioner the fate of his those motions, as required under FRCP 5(a). The district court did not do so. Further, the United States is a real party of interest in the case, and under FRCP 54(b), **the rights of the United States and defendants' liabilities to the United States** have to be resolved, prior to the termination of the district court's jurisdiction on the case. FRCP 54(b) states,

"Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented

in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicate fewer than all of the claims or the rights and liabilities of fewer than all of the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of the judgment adjudicating all the claims and the rights and liabilities of all the parties."

In the instant case, the court erred from the beginning and petitioner filed motions for the court to rule, which again were not acted upon by mistake. Later on, the court mistook again stating petitioner's amended complains on other issues as amended complaints on his qui tam complaints. Petitioner did not file any amended qui tam complaints for FRCP 15(a) to be applied. Petitioner timely filed motions under FRCP 59, which the court must resolve and notify petitioner, prior to the termination of the case at the district court, and ruling could be appealed. Petitioner cannot be denied his appeal rights due to the multiple procedural and factual errors of the district court.

The appeals court's ruling is contrary to numerous decisions and long standing position of this court on this issue, See Hohorst v. Hamburg-American Packet Co., 1893, 148 U.S. 262; Collins v. Miller, 1929, 252 U.S. 364; Reeves v. Beardall, 316 U.S. 283 (1942); Cold Metal Process Co. v. United Engineering & Foundry Co., 351 U.S. 445 (1956).

The district court erroneously treated the remaining issues as if they did not exist and the appeals court issued its ruling based on the erroneous reading of the district court, which definitely denied petitioner's due process rights.

3. Arguments under Question No. 3.

Petitioner is required to file the qui tam complaints and related materials in camera & under seal until he has served the process on the Government, and the Government has investigated the complaints and after that when the court ordered to open the sealed complaints, 31 USC §§ 3730 (b)(1), (b)(2), (b)(3), & (b)(4). If the petitioner file the qui tam complaint or any related motion in open court, until the court ordered to open the sealed papers filed in camera, his complaints could be dismissed with prejudice. For these reasons petitioner complied with the statutory requirements and other court's interpretation on the requirements filing the papers in camera, under seal at this stage of the proceeding, See U. S. ex rel. Pilon v. Martin Marietta Corp., C.A.2 (N.Y.) 1995, 60 F.3d 995. In the instant case the problem originated from the court's not opening the sealed papers and issuing erroneous orders on the merits of the case even without looking at what is being communicated in those sealed papers. Petitioner was adversely affected due to the district court's not opening the sealed papers, not examining the contents as to whether the filed motions are under FRCP 59 which require the court to rule on them and communicate to petitioner on the outcome of his motions, or whether the motions are under FRCP 15(a) for leave of the court to file the amended qui tam complaints.

As a result, not only petitioner was prevented from serving the process on the Government on the undecided qui tam complaints, the district court made numerous errors in its ruling on the issues it decided, and finally petitioner was not given a clear date as to when to file an appeal, thereby denied

him his due process of law to press his claims. The appeal court made a number of errors by not considering the requirements FRCP 54(b) and 28 USC § 1291, & holding that the notice of appeal was not filed timely depriving its jurisdiction on the appeal.

Clearly the FRCP 59 motion creates issues which needed to be resolved prior to the filing of the appeal. The district court is required to serve on the petitioner as to the outcome of his motion in compliance of FRCP 5(a). By not opening petitioner FRCP 59 motions filed in camera under seal, by not ruling on the motions and by not serving petitioner about the outcome of his filed motions, the court denied petitioner's due process rights.

Petitioner's time on filing the notice of appeal cannot start to run until the district court ruled **on his prior filed motions** and complied with the requirements of FRCP 54(b) and 28 USC § 1291. The appeal court made prejudicial errors in not reviewing the appeal and ruling that it has no jurisdiction on the appeal, thereby denied petitioner the due process of law.

4. Arguments under Question No. 4

As already stated in the statement of the case, petitioner did not file any motion for leave of the court to file any amended qui tam complaint. There were two separate amended complaints filed in those dates **(See Appendix-3 at 5)** mentioned by the court; (1) One dealt with petitioner's Title VII claim; (2) and the other dealt with petitioner's common law tort claims of (a) Intentional Infliction of Extreme Mental distress and (b) violation of privacy rights. These motions have no relevance on petitioner's qui tam complaints. The district court made a misconstruction of facts here because it did not open petitioner's sealed pleadings submitted in camera which dealt with his qui tam complaints. Petitioner filed two timely motions under FRCP 59 in camera, under

seal on 9/16/1996, which are recorded and can be seen in the docket sheet. These motions and issues related to qui tam complaints remained unaddressed and unresolved on January 27, 1998, when the court issued the judgment. That is why, under FRCP 54(b), that judgment is not appealable.

The district court stated in Appendix-3 that there was no issues pending when it issued the judgment on 1/27/1998, which is factually incorrect. The circuit court had the records, which it failed to examine to determine whether any issues were pending in the district when the January 27, 1998 judgment was issued. It then made erroneous construction of facts and reached erroneous conclusion of law by stating that the January 27, 1998 judgment was appealable. It ignored the facts that all the claims and all the liabilities as to all the parties were not resolved in that ruling. **For example,**

(a) The claims of the United States against the mining claimants in two separate suits, under the False Claims Act, were not resolved in that ruling. **(See Appendix 4, 5 & 6)**

(b) The liabilities of the named Forest Service employees to the United States, in two separate suits, under the False Claims Act, were not resolved in that ruling.

(c) Petitioner's qui tam claims against the named Forest Service employees were not resolved in that ruling.

(d) Petitioner's qui tam claims against the mining claimants, under the False Claims Act, were not resolved in that ruling.

For those reasons, the January 27, 1998, judgment is not appealable under FRCP 54(b) and 28 USC § 1291. Petitioner filed his appeal timely and the Ninth Circuit Court of Appeals had the jurisdiction to review the district court's rulings. The appeals court erroneously stated that it had no jurisdiction over the appeal because it was not filed timely. By denying

jurisdiction on petitioner's legitimate and timely appeal, the Circuit Court has denied petitioner the due process of law, guaranteed under the Fifth Amendment of the Constitution.

5. Arguments under Question no. 5

Plaintiff, a civil servant, is protected under 31 USC 3730(h). The court has reproduced this provision of the False Claims Act in **Appendix 10, under D at 38-39.** However, the district court stated that Federal Employees are not entitle to pursue the protection provided under the False Claims Act, because they are protected under the Civil Service Reform Act (CSRA), 5 USC §§ 1213, 2302, which provided the sole remedy. The district court's construction contradicts the statutory construction of the False Claims Act. Further, petitioner pursued the Civil Service Reform Act prior to filing in the district court. The Office of the Special Counsel denied petitioner protection under the CSRA and wrote petitioner that he was denied certification as a Mineral Examiner and his position was unfunded in retaliation for his protected activities under the False Claims Act. He stated that those retaliatory actions are not within the coverage of the CSRA and dismissed his complaint. That left petitioner without any remedy.

However, the statutory language of 31 USC § 3730(h) is clear. It made no exception to the Federal Employees in offering protection. The statutory history is also clear in offering protection to **all** employees, without exception. When the statutory language is clear it is entitle to judicial deference. The court cannot read within a statute a presumption which is not there.

Further, the False Claims Act is designed to protect the United States from defrauding. The Federal Employees are the first line of defense for the Government and it is logical to conclude that the statute is intended to protect Federal

Employees from retaliation when those employees will engage in protected activities. The court cannot interpret the statute otherwise. Petitioner had pursued the Civil Service Reform Act where he was not given coverage by the Special Counsel. Obviously the Congress did not leave petitioner without any protection from retaliation for his protected activities under the False Claims Act. Petitioner's contention is that the False Claims Act covers him from retaliation and the district court's construction in **Appendix 10 at 38-39 is** erroneous and must be reviewed by this court.

6. Arguments under Question no. 6

Petitioner's Privacy Act claim is not time barred. In **Appendix-6, under D at 16-17**, the district court stated that petitioner's claim under Privacy Act, 5 USC § 552a, is time barred. The court erred in applying facts to the law and in applying the state of California case law, Elkins v. Derby, 12 C.3d 410, 115 Cal rptr. 641, 525 P.2d 81 (1981), which states that when petitioner was seeking administrative remedies in any related issues, the statute of limitation of all of its cases tolled. Petitioner filed appeal to the Forest Service on November 21, 1990, which was returned pending further processing. Petitioner again filed appeal on June 07, 1991, which was not resolved until April, 1993. At that point petition was denied certification and his position was unfunded. He filed complaint with office of the Special Counsel under CSRA. Factually, the last day of violation of Privacy Act took place on May 5, 1994 when further violation of Privacy Act took place. Petitioner was seeking administrative remedies under the Civil Service Reform Act at that point. Within 30 days of dismissal of his case from the Merit Systems Protection Board for lack of jurisdiction, he file the complaint in the District Court on March 29, 1995, and filed claims for violation of Privacy Act. As a result the defendants were under notice about the claim from that day. That complaint was amended and filed subsequently, which

relates back to the original complaint, See FRCP 15(c). The court erred in applying relevant statutes, rules and facts of the case. But the court took the day of violation as sometime in 1990, and disregarded the later violation dates.

The court stated in **(Appendix 6 at 17), "Nonetheless, Paul did not file his administrative claim until February 10, 1996, more than three years after the relevant statute had run. Equitable tolling is therefore not appropriate in this case."** The court is wrong in its holdings.

5 USCS § 552a (g)(1)(D) provides, "Whenever any agency fails to comply with any other provision of this section, or any rule promulgated thereunder, in such as way as to have an adverse on an individual, the individual may bring a civil action against the agency, and the district court shall have jurisdiction in the matters under the provisions of this subsection."

The cause of action arose after an individual is adversely affected. Petitioner was materially damaged starting from, March 16, 1992, when he was denied the job of "RECLAMATION MANAGEMENT SPECIALIST", and from April, 1993, when his position was unfunded and when his certification was denied. At that point he went to the Office of the Special Counsel, to seek administrative remedies under the CSRA. Within a month of their determination petitioner filed with the district court on May 29, 1995.

The statute provide no other requirements to be satisfied prior to filing in the district court. The district court's requirements of administrative remedies on this issue, as outlined under the Federal Tort Claims Act, 28 USC § 2671-2680, is not a Privacy Act prerequisite.

For these reasons, this court should review the district court's determination.

7. Arguments under Question No. 7

The district court stated in **Appendix-8 in IV at 25 under A, "Because plaintiff offered no direct evidence of discriminatory intent——". This statement is erroneous. Petitioner not only offered direct evidence of discriminatory intent, he has also filed a number of claims based on defendants' intentional torts, such as "Intentional Infliction of Mental Distress", "Invasion of Privacy", " Violation of Privacy Act," among other tortious acts, for which the court itself has ruled on; see Appendix -6, under C & D, at 15-17.**

Petitioner offered overwhelming evidence of discriminatory intent and has repeatedly pleaded the "discriminatory intent" element in his complaints. The Agency refused to hire petitioner as an Interdisciplinary Reclamation Specialist, a GS-13 level job, on March 16, 1992, due to his race & national origin. Even though the Office of the Personnel Management (OPM) has classified petitioner in 1984 and in 1986, as eligible for GS-15 level jobs in mining engineering and in reclamation related jobs. Petitioner submitted OPM's eligibility determination about him and the agency' letter refusing to hire him, as part of his evidence on record to the district court. Petitioner offered evidence that the agency intentionally discriminated against petitioner because he was not allowing white mining claimant's fraudulent claims against the United States. The person the agency hired was never classified by the OPM as eligible for any reclamation job. She had never gone or worked in underground mines and had no evidence of working in mine reclamation. She did not have even the MSHA's safety training certification to go underground four years after her appointment to the job! The MSHA certification was one of the prerequisite to appoint anyone to the advertized job. The court erred in applying facts and submitted evidence of the case to the law i. e. to 42 USC § 2000e-16.

Petitioner offered evidence of intentional discrimination on the terms and conditions on his employment. The court erred

in not capturing the offered evidence. Petitioner has established a prima facie case of race discrimination with direct evidence of discriminatory intent. The district court's ruling disregarded the offered evidence. For this reason this court should review the district court's decision on this issue.

After petitioner was unfunded and denied certification as a mineral examiner, the agency went to Ugden, Utah; Spokane, Washington; to Placerville, CA and to Albuquerque, New Mexico, among other places, to get white mineral examiners service to clear list fraudulent mining claims to the white mining claimants. These evidences showed that persons of petitioner's qualification were needed by the agency to get its work done, but refused petitioner to work on his chosen vocation in deliberate violation of the Title VII of the Civil Rights Act of 1964. These evidences were submitted to the district court. The district court erred in its ruling on this issue and this court should grant certiorari.

8. Arguments under question no. 8

The district court in **(Appendix -6 under B at 13-15)** stated that as a civil servant, petitioner was not entitle to press his constitutional claims against the United States, if Congress has provided an alternate and exclusive statutory remedy. The district court stated that the Civil Service Reform Act (CSRA) provided alternative remedy for him. However, petitioner has sought the help of the Office of the Special Counsel, who denied petitioner coverage under the CSRA. Because the CSRA did not give coverage, petitioner is entitle press his constitutional claims. The district court cited Ninth Circuit case laws. However, those case laws applies if the supervisor of the employee, while acting within the scope of his official duties, violate plaintiff's constitutional rights. Petitioner also filed claims against the named Forest Service employees, The district court made a number of factual errors in analyzing petitioner's case: (1) None of the named

Forest Service's employees were petitioner's supervisor. Not a single one. (2) None were acting within the scope of their duties while they were fraudulently clearlisting Federal Lands administered by the San Bernardino National Forest and by the Inyo National Forest, for mineral patents. Petitioner has submitted **to the court "Zone Management Plan for the South Minerals Area Management Zone"** under which the above named two National Forests lie. None of the named Forest Service employees worked within that Zone. They have no authority given by anyone to clearlist or adjudicate any lands under the Mining Laws of the United States. So, they were clearly acting outside their scope of duties.

The Attorney General issued certification to the district court, 28 USC § 2679(d)(1) stating that the named Forest Service employees were working within the scope of their duties while they violated petitioner's constitutional rights. However, she failed to show who, where and when anyone authorized the named Forest Service employees to adjudicate Federal lands administered by those two National Forests. The Zone management plan has three signatures i. e (1) by the Regional Forester, (2) by the Regional Director of Mineral Area Management, (3) and by the Supervisor of the San Bernardino National Forest. Zone Management Plan containing the three signatures was submitted to the district court as evidence that the named Forest Service employees were working outside of their delegated authorities when they violated petitioner's protected rights and when they were unlawfully clearlisting Federal lands. The Attorney General, when arbitrarily, unlawfully certifying to the court that the named employees were working within the scope of their duties, decided to disregard the submitted evidence. Petitioner contested the attorney General's certification in the district court and it is an issue, which should be reviewed by this court.

Besides, the False Claims Act, **31 USC §§ 3738(01 through 12)**, prohibit Federal employees fraudulently clearlisting

Federal lands to the mining claimants. From the statutory point of view, the named Forest Service Employees were working outside their delegated duties. But the Attorney General disregarded the statutory requirements, while certifying to the court.

Further, 28 USC § 2679(b)(2) states, Paragraph (1) does not extend or apply to a civil action against an employee of the Government-
(A) which is brought for a violation of the Constitution of the United States, or
(B) which is brought for a violation of a statute of the United States under which such action against an individual in otherwise authorized.

Petitioner contends that he can press his claims against the named Forest Service employees because (1) they have violated the Constitution, and (2) they cane be, and are sued as codefendants under 31 USC § 3730(b)(2) and the Attorney General's certification cannot shield them from petitioner's claims. However, the district court erroneously dismissed petitioner's claims, (**see Appendix-6, under C at 15-17, & Appendix-8, under VI A & B, under VII A & B at 27-30,) giving credits to the Attorney General's certification, by disregarding petitioner's submitted evidence and by disregarding the statutory requirements.**

Petitioner believes that the district court's holding on this issue left the petitioner, a civil servant, without any legal recourse against whatever tortious injury he may have suffered, because he was trying to protect public properties from fraudulent claims & unauthorized adjudications.

For the aforesaid reasons, this court should grant the petition and review the district court's holdings against petitioner's claims.

9. Arguments on Question no. 9

Petitioner stated a claim against the named Forest Service employees for state law tort claims of (1) slander and (2) defamation. The district court stated in **(Appendix-8 under VI A at 27)** the Attorney General's certified that those named Forest Service employees were working within the scope of their duties when they violated petitioner's rights.

As explained and argued under **Argument no. 8,** the named Forest Service employees were working outside of their delegated authorities while they violated petitioner's state law protected claims. Further, they did not contain the defamatory and slanderous communications between themselves. Petitioner submitted evidence and given name of Desmond Bain as one of the persons the defendants communicated defamatory materials. Petitioner have shown that the named defendants have made false, slanderous communication to not less than 12 individuals outside of the respective privileged groups, if any, where defamatory messages were exchanged. So the district court's premise on this issue is not consistent with the allegations made and with the evidence submitted.

Further, defendants have intentionally, deliberately, and repeatedly violated petitioner's constitutional rights. As per 28 USC § 2679(b)(2)(A), the Attorney General's certification cannot shield defendants, the named Forest Service employees, from petitioner's state law tort claims. Violation of the Constitution can never be within the scope of any Civil Servant's official duties. This provision of the FTCA specifically stated Attorney General's certification does not apply in the instant case. This court should review the propriety of Attorney General's certification and its application in the instant case. The district court erred in its application of the facts to the law here.

Further, the named Forest Service employees have been named as codefendants for conspiracy and for defrauding the United States, under the False Claims Act. For this reason as well, as per 28 USC § 2679(b)(2)(B), Attorney General's certification cannot shield them from petitioner's state law tort claims. Petitioner has filed claims against the said defendants under the False Claims Act, 31 USC §§ 3730(b)(2) and 3730(h) whose provisions they have violated while violating plaintiff's state law protected rights. The statute authorize action against the said defendants and petitioner have filed claims against them. For this reason, the Attorney General's certification cannot shield defendants from petitioner's claims. The district court erred in dismissing petitioner's claims against the named Forest Service employees and this court should review the district court's decision on these issues.

10. Arguments under Question No. 10

Petitioner's tort claims against the United States for **Intentional Infliction of Mental Distress** and **Invasion of Privacy** under the Federal Tort Claims Act have been by the district court **(See Appendix-6 under C at 15-16), saying** that both of these tort claims cannot be pressed because of slander and defamation exemption in the 28 USC § 2680(h). As already stated, the Attorney General's certification unlawful and not based on the evidence on record. As for the claims against the United States, these torts are distinguished from slander or defamation, because the elements are different. They are not same torts and cannot be dismissed one tort as same the other. The district court made errors in dismissing petitioner's claims and should be reviewed by this court.

CONCLUSION

The Ninth Circuit Court of Appeals improperly and unlawfully denied jurisdiction of petitioner's appeal. The denial is based on erroneous conclusion of the district court. The district court made numerous errors in deciding important issues. This erroneous denial of jurisdiction against overwhelming evidence is arbitrary, capricious and is violative of the due process. The Circuit Court's decision violated a number of long standing decision of this court and must not be allowed to stand.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

Dilip K. Paul

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Appendix-1

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

AUG 23 2000

No. 99-15199
DC # CV-95-01096-VRW
Northern California
(San Francisco)

DILIP PAUL,

Plaintiff-Appellant,

v.

ORDER

DAVID FREDLEY; SAM HOTCHKISS; FREDERICK MULLIN; BOB RANDLOPH; ROBERT E.THOMPSON; HILTON CASS; SYLVIA ARBELBIDE; DAN GLICKMAN, Secretary ;UNITED STATES OF AMERICA; RICH HARTY; US DEPARTMENT OF FOREST SERVICE; MIKE DOMBECK, Chief, Forest Service,

Defendants-Appellees.

BEFORE: FERGUSON, RYMER and HAWKINS, Circuit Judges

Paul's petition for panel rehearing is denied.

No further filings will be accepted in this closed appeal

Appendix-2

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

JULY 11 2000

No. 99-15199

DC # CV-95-01096-VRW

DILIP PAUL,

Plaintiff-Appellant,

v.

DAVID FREDLEY; SAM HOTCHKISS; FREDERICK MULLIN; BOB RANDLOPH; ROBERT E.THOMPSON; HILTON CASS; SYLVIA ARBELBIDE; DAN GLICKMAN, Secretary ;UNITED STATES OF AMERICA; RICH HARTY; US DEPARTMENT OF FOREST SERVICE; MIKE DOMBECK, Chief, Forest Service,

Defendants-Appellees.

MEMORANDUM[1]

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[1]This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3

Appeal from the United States District Court
for the Northern District of California
Vaughn R. Walker, district Judge, Presiding

Submitted June 26, 2000[2]

BEFORE: FERGUSON, RYMER and HAWKINS, Circuit Judges

Dilip Paul appeals pro se from district court's order denying his motion for reconsideration of an order granting summary judgment for defendants in his action under various federal and state laws alleging that defendants denied him due process, invaded his privacy and intentionally inflicted emotional distress upon him when he lost his job at the Department of Agriculture. We have jurisdiction under 28 U.S.C § 1291 to review the district court's denial of Paul's motion for reconsideration. We lack jurisdiction over the underlying judgment because Paul did not file his notice of appeal within thirty days of entry of judgment. *see Harman v. Harper,* 7 F.3d 1455, 1457-58 (9th Cir. 1993). We review for abuse of discretion the court's denial of a motion for reconsideration, see id. at 1458, and we affirm.

Paul's contention that the judgment was not final lacks merit because it was clear that the court had resolved all issues necessary to establish the legal rights and duties of the parties. *see Federal Ins. Co. v. Scarsella Bros., Inc.* , 931 F.2d 599, 601 (9th Cir. 1991). Accordingly, the district court properly denied Paul's motion for reconsideration. *See*

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[2] The panel unanimously finds this case suitable for decision without oral argument. See Fed R, App. P. 34(a)(2).

School Dist. No. 1J, Multnomach County v. ACandS. Inc., 5 F.3d 1255, 1263 (9th Cir. 1993).

AFFIRMED.

Appendix- 3

FILED
AUGUST 27 1998

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DILIP K. PAUL

Plaintiff,

v.

No. C-95-1096-VRW

DAVID FREDLEY, et al.,

ORDER.

Defendants.

Plaintiff Dilip Paul brings this action asserting an array of claims against a host of defendants in the federal government. On May 14, 1996, the court dismissed many of these claims including Paul's qui tam claim under the False Claims Act (FCA). In doing so, however, the court provided Paul with leave to amend this claim. See May 14, 1996, Ord at 7. On June 14, 1996, Paul filed an amended complaint. Although this complaint was difficult to decipher, it appeared that Paul was attempting to state two different causes of action under the FCA. See Am Compl at ¶¶ 2, 25, 26. On September 5, 1996, the dismissed Paul's FCA claims. The court held that the Civil Service Reform Act preempted Paul's first FCA claim and that Paul could not bring his second claim because (as he stated in his complaint) the government was already investigating the allegations he was making. See Sept 5, 1996, Ord at 6-8. On September 25, 1996, the court denied Paul's motion to reconsider this order.

On June 2, 1997, Paul attempted to file another amended complaint. Apparently, Paul later realized that he could not file this amended complaint without leave of the court. See FRCP 15. On July 22, 1997, Paul filed a motion for leave to amend his complaint. The court never granted this motion. As a result, Paul never actually filed an amended complaint.

On January 8, 1998, the court issued an order granting defendants' motion for summary judgment on all Paul's remaining claims. The court instructed the clerk to terminate all pending motions and enter judgment for the defendants. The clerk did so.

Currently pending before the court is Paul's motion for relief from judgment pursuant to FRCP 60. Paul argues that the court erred in closing the file because his FCA claims are still pending. This is not the case. The court dismissed these claims in September 5, 1996. The court never gave Paul leave to amend his complaint. Pursuant to the court's direction, the clerk terminated Paul's motion for leave to amend when she entered judgment for defendants.

For the foregoing reasons, the court DENIES Paul's motion (DOC # 98, Pt # 1; Doc# 99, Pt # 1) for relief from judgment.

IT IS SO ORDERED.

/ s/- VAUGHN R. WALKER
VAUGHN R. WALKER
United States District Judge

Appendix- 4

FILED
JANUARY 27 1998

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DILIP K. PAUL

Plaintiff,

v.

No. C-95-1096-VRW

DAVID FREDLEY, et al.,

JUDGMENT
Fed. R. Civ. Pro. 58

Defendants.

ENTERED IN CIVIL DOCKET JAN 29 1998

In accordance with this court's orders of April 21, 1997, and of January 8, 1998, plaintiff's motion for entry of default is DENIED. Defendants' motion to dismiss and for summary judgment are GRANTED. Judgment is entered in favor of defendants and against plaintiff.

Richard W. Wieking
Clerk, United States District Court

Dated: 1-27-98

-/s/- W. Bailey
WYNETTE BAILEY, Deputy Clerk

Appendix- 5

FILED
JANUARY 27 1998

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DILIP K. PAUL

Plaintiff,

No. C-95-1096-VRW

v.

ORDER.

DAVID FREDLEY, et al.,

Defendants.

On January 8, 1998, the court granted summary judgment in favor of the defendants on all of plaintiff Dilip Paul's remaining claims. Currently pending before the court is a motion by Paul for reconsideration of this order. Specifically, Paul asks the court to revisit the issue of Attorney General certification that he raised in a motion filed on January 13, 1997. The court already addressed this issue and denied Paul's motion. See Apr 21, 1997, Ord. In addition, the court has already ruled that Paul's motion for reconsideration of this issue presented "no meritorious grounds for reconsideration." See Jun 12, 1997, Ord at 1. In light of these earlier orders, and the similarly groundless nature of the current motion, the court once again DENIES Paul's motion for reconsideration.

IT IS SO ORDERED

/s/- VAUGHN R. WALKER
VAUGHN R. WALKER
United States District Judge

Appendix- 6

FILED
JANUARY -8 1998

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DILIP K. PAUL

Plaintiff,

No. C-95-1096-VRW

v.

ORDER.

DAVID FREDLEY, et al.,

Defendants.

Without the assistance of counsel, plaintiff Dilip Paul brings this action against the United States and nine individual federal defendants. Paul brings claims against the United States under the Federal Tort Claims Act alleging that certain federal employees invaded his privacy and committed the tort of intentional infliction of emotional distress . As for the individual defendants, Paul asserts Bivens[1] claims and alleges the violated his Fifth Amendment due process rights.

Prior to his termination, Paul was employed by the Department of Agriculture and was responsible for examining and enforcing mining claims on national forest

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[1] See Bivens v Six unknown Named Agents, 403 US 388 (1971)

land. In order to continue in his position, Paul sought the necessary government certification. After Paul was denied this certification, the government withdrew funding for his position, and he lost his job. Paul claims that in this process, the government and its agents denied him his constitutional rights and committed several intentional torts against him. On October 2, 1995, Paul filed an amended complaint, and the defendants responded with a motion to dismiss. The court granted this motion on may 16, 1996, but provided Paul with leave to file another amended complaint. He did so on June 14, 1996.

In response to the second amended complaint, the defendants again moved to dismiss all of Paul's complaint. Plaintiff opposed defendants' motion, and the court took the matter under submission without oral argument. On September 25, 1996, the court issued an order granting in part and denying in part defendants' motion to dismiss. At this stage of the litigation, the plaintiff had five remaining claims: (1) a Title VII claim against the Secretary of Agriculture; (2) Bivens claims against nine individual defendants; (3) defamation claims against the individual federal defendants; (4) invasion of privacy claims against the individual federal defendants; and (5) intentional infliction of emotional distress claims against the individual federal defendants.

On April 21, 1997, the court granted summary judgment in favor of the defendants on some of the claims. With regard to Paul's Bivens actions and two of his state tort claims, the court gave Paul leave to amend his complaint. In doing so, however, the court instructed Paul to " amend his complaint to make clear the for his Bivens claims and his claims of invasion privacy and intentional infliction of mental distress." The court further ordered that Paul could not allege any new causes of action without leave of the court. See April Order at 12; See also FRCP 15(a).

After seeking and receiving extra time to file his amended complaint, Paul did so. Currently pending before the court are Paul's motion for entry of default against the defendants and defendants' motion to dismiss the remaining claims. For the following reasons, Paul's motion will be denied and the defendants' motion (constructed as a motion for summary judgment) will be granted.

I

Turning first to the motion for a default judgment, Paul claims that the United States and its officers are in default because they failed to respond to his amended complaint in the time frame allegedly imposed by FRCP 15(a). FRCP 15(a) provides that once the court has given the plaintiff leave to file an amended complaint, and the plaintiff has done so, the defendant must plead a response in ten days. Paul claims that because he filed his second amended complaint on June 16, 1997, the Government had to respond by June 16, 1997. Since FRCP 6(e) affords defendants who are served by mail with extra three days, it would actually appear that the terms of FRCP 15(a), if applicable, gave defendants (at least those of them who were served by mail) until June 19, 1997, to file a responsive pleading. Either way, defendants did not file their motion to dismiss until July 11, 1997, and Paul therefore urges the court to enter the defendants' default.

It could be argued, however, that FRCP 12(a)(3) not FRCP 15 (a) is the relevant rule in this case. FRCP 12(a)(3) specifically provides the government with 60 days to answer a complaint. FRCP 15(a), on the other hand, makes no mention of cases involving the United States or its officers. This begs the question whether FRCP 12(a)(3) and its 60 day time period for the Government apply to amended complaints as well as original complaints or whether the United States

and its officers must follow FRCP 15(a) and its general time line for responding to amended complaints.

While the court is concerned by the possibility that the government may not have responded in a timely fashion, the court need not determine whether FRCP 12(a)(3) or FRCP 15(a) applies because the entry of default could have no practical effect in this case. FRCP 55(e) dictates that no judgment by default shall be entered against the United States or any of its officers unless the plaintiff establishes a claim to relief through satisfactory evidence. As the court will discuss below, Paul's claims lack merit and thus cannot be the basis for a default judgment. As such, the entry of default is practically irrelevant, and the court will therefore deny plaintiff's motion for an entry of default. In light of this ruling, the court need not address the defendants' contention that Paul's motion is precluded because he failed to serve the defendants properly.

II

As for the defendants' FRCP 12(b)(6) motion to dismiss, it is untimely. A 12(b)(6) defense must be asserted within the pleadings, in a motion for judgment on the pleadings or at trial. See FRCP 12(h)(2). When a motion to dismiss involves matters outside the pleadings, the court must treat the motion as one for summary judgment. See FRCP 12(b). The defendants did not include their motion to dismiss within the pleadings. Moreover, both Paul and the defendants have filed documents outside the pleadings. Just as it did before in an earlier order, the court will therefore construe defendants' motion an FRCP 56 motion for summary judgment.

A

Summary judgment is a method for the prompt disposition of an action in which there is no genuine issue of material fact.

FRCP 56(c) provides for the granting of summary judgment where the moving party is entitled to judgment as a matter of law. The burden of establishing that there is no genuine issue of material fact lies with the moving party. Celotex Corp v Catrett, 477 US 317, 322-23 (1986). Once the moving party has that burden by presenting evidence which, if uncontradicted, would entitle it to a directed verdict at trial, FRCP 56(e) shifts to the nonmoving party the burden of presenting specific facts showing that such contradiction is possible. British Airways Bd v Boeing Co, 585 F2d 946, 950-952 (9th Cir 1978).

A party opposing summary judgment may not rest upon the mere allegations or denials of his pleadings. Rather, responses, either by affidavits or as otherwise provided in the rule, must set forth specific facts showing that there is a genuine issue for trial. A mere "scintilla" of evidence supporting the nonmoving party's position will not suffice. The showing must be sufficient for a reasonable jury to find for the nonmoving party. Anderson v Liberty Lobby , Inc, 477 US 242 (1986)

The question at summary judgment is whether reasonable minds could differ over the import of the evidence. Eisenberg v Insurance Co of North America, 815 F2d 1285, 1288 (9th Cir 1987). "If the evidence is merely colorable * * * or is not significantly probative, summary judgment may be granted." Id. The nonmoving party's evidence is to be taken as true and inferences are to be drawn in the light most favorable to the nonmoving party. Id at 1289.

B

The essence of plaintiff's constitutional claim is the individual defendants denied him his occupational livelihood without due process of law. To the extent that the plaintiff brings his claims under 42 USC §§ 1983 and 1985, the defendants are entitled to judgment as a matter of law. These

statutes apply only to state actors, and defendants in this case were all federal actors.

Even if Paul's claim is properly construed as arising under Bivens, however, it still fails to survive the defendants' motion for summary judgment. The Supreme Court has limited the rights of former federal employees to sue government defendants under the constitution if Congress has provided an alternate and exclusive statutory remedy. See Schwieker v Chilicky, 108 Sct 2460, 2468-71 (1980); Carlson v Green, 100 Sct 1468, 1471-72 (1980). For example, in Bush v Lucas, 462-367, 388 (1983), the Court held that a federal employee who was demoted after he criticized a government agency could not sue government officials for violation of his constitutional rights because the Civil Service Reform Act (CSRA) provided elaborate remedial mechanisms for such claims. In particular, the CSRA allows federal employees to submit complaint regarding "prohibited personnel practices" to the Special Counsel of the Civil Service Board. See 5 USC § 1206(a)(1). This provision therefore generally preempts Bivens claims. See Karamanos v Egger, 882 F2d 447, 452 (9th Cir 1989).

Paul argues that the CSRA does not preempt his particular claim because the Special Counsel ruled that the denial of certification and unfunding of his position were not personnel actions with the meaning of 5 USC § 2302(a)(2). In other words, Paul claims that because CSRA did not actually provide him with a remedy, it has no preemptive force in his case. The Ninth Circuit has squarely rejected this argument. In Saul v United States, 928 F2d 829, 840, the court held that "the CSRA precludes those Bivens claims for which the act prescribes no alternative remedy." Saul held that Congress is better positioned than the courts to craft remedial mechanisms for disgruntled federal employees, and its decisions to omit certain actions from the scope of the CSRA carries as much preemptive force as its decisions to include others. See id.

In addition, the court notes that the case at bar is distinguishable from Kent v Howard, 801 F Supp 329, 333 (SD Cal 1992). In Kent, the court held that the CSRA did not preempt the Plaintiff's state law claims for sexual harassment because the alleged conduct bore "no relation to the supervisor/subordinate relationship." Id. The Kent court refused to apply Saul because the sexual harassment at the heart of Kent's complaint, unlike the alleged actions in Saul, were not related to personnel decisions and thus did not trigger CSRA or its preemptive force. In the case at bar, however, the conduct complained of was a personnel decision. Since Saul applies, Paul's claim is preempted and the court will grant summary judgment in favor of the individual defendants.

In addition, it appears that the individual defendants would also be entitled to summary judgment on the basis of qualified immunity. See Somers v. Thruman, 109 F3d 614, 617 (9th Cir 1997). Nonetheless given the preemptive force of CSRA and the fact that the individual defendants have not raised this defense, the court will not address it.

C

Turning to Paul's claim for intentional infliction of emotional distress, the court has already determined that the alleged wrongful conduct fell within the scope of the individual defendants' employment. See Order, April 21, 1997, at 9-11. Paul can therefore only bring his intentional infliction claim against the United States under the Federal Tort Claims Act (FTCA). See 28 USC § 2679 (b)(1).

To prevail on a claim for intentional infliction of emotional distress, a plaintiff must prove that (1) the defendant engage in extreme and outrageous conduct, (2) the defendant intentionally or recklessly caused the plaintiff emotional

distress, and (3) this distress was severe and extreme. See Cervantez v J. C. Penny Co, 24 Cal 3d 579, 593 (1979); Paulson v State Farm Mutual Automobile Ins Co, 867 F Supp 911, 919 (CD Cal 1994). Under California's model jury instructions, a plaintiff satisfies the first element and demonstrate the requisite severity if he shows that the distress he suffered was of "such substantial quantity or enduring quality that no reasonable person in a civilized society should be expected to endure it." BAJI § 12.73; see also Paulson, 867 F Supp at 919.

The basis of Paul's claim for intentional infliction is that the individual defendants made unauthorized disclosures of certain personnel information, and these disclosures placed Paul in a bad light. Nonetheless, the complaint alleges little more than that government employees wrongly attributed certain mineral reports and related statements to Paul. This does not raise to the requisite level of outrageousness. See Agarwal v Johnson, 25 CAL 3D 932, 946 (1979).

In addition, Paul's claim for intentional infliction arises entirely out of allegedly false statements of the government employees. The allegedly outrageous nature of these disclosures is therefor interwined with their falsity as such, the FTCA's bar on slander and libel actions extends to and precludes Paul's intentional infliction claims. See Block v Neal, 460 US 289, 297-99 (1983). The court will therefore grant summary judgment in favor of the United States on this claim.

D

Finally, Paul claims that the government is liable to him under the Privacy Act because the reference to him in the reports were allegedly false. See Amend Compl at ¶¶ 8-11. The statute of limitations for an action brought under the Privacy Act is two years. See 5 USC § 552a(g)(5). The

allegedly unauthorized disclosures at the heart of Paul's complaint took place in 1990. See Amend Compl ¶¶ 6-8. Paul's claim under the Privacy Act is therefore time barred.

Under the doctrine of equitable tolling, the court have the power to toll the statute of limitations while plaintiff pursues administrative remedies. Paul has submitted evidence that he has persuaded such remedies. Nonetheless, Paul did not file his administrative claim until February 10, 1996, more than three years after the relevant statute of limitations had run. equitable tolling is therefore not appropriate in this case.

Even if the court were to construe Paul's claim as a common law action for false light invasion of privacy and put aside the relevant statute of limitations issues, his claim would still fail. Much like the case with intentional infliction claims, the FTCA prevent plaintiffs from bringing false light claims against the government if the underlying basis of the claim is an allegedly slanderous or libelous statement. See Neal, 46o US at 297-99; Metz v. Unted States, 788 F2d 1528, 1535-36 (11th Cir 1986); Hobdy v United States , 762 F Supp 1459, 1462 (D Kan 1991). In this case, because Paul has alleged that the government employees lied about him, the FTCA bars his false light claim. The court will therefore grant summary judgment for the United States on this claim.

III

For the foregoing reasons the court DENIES Paul's motion for entry of default (Doc # 88, Pt # 1). The court also construes the defendants' motion to dismiss (DOC # 87, Pt # 1) as a motion for summary judgment and GRANT this motion. Because this eliminates all of Paul's claims, the clerk is directed to enter judgment in favor of the defendants.

IT IS SO ORDERED.

/ s/- VAUGHN R. WALKER

VAUGHN R. WALKER
United States District Judge

Appendix- 7

FILED
JUNE 12, 1997

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DILIP K. PAUL

Plaintiff,

No. C-95-1096-VRW

v.

ORDER.

DAVID FREDLEY, et al.,

Defendants.

On April 21, 1997, the court entered summary judgment in favor of the defendant on plaintiff's claim of national origin discrimination in violation of Title VII, 42 USC § 2000e-16. On May 20, 1997, plaintiff filed a motion for leave to file a motion for reconsideration of the court's April 21, 1997, order. See Civil LR 7-9. The court reviewed plaintiff's motion and finds that it present no meritorious grounds for reconsidering the previous order. Accordingly, plaintiff's motion for leave to file a motion for reconsideration is DENIED.

IT IS SO ORDERED.

sd- VAUGHN R. WALKER
VAUGHN R. WALKER
United States District Judge

Appendix- 8

FILED
APR 21 1997

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DILIP K. PAUL

Plaintiff,

v.

No. C-95-1096-VRW
ORDER.

DAVID FREDLEY, et al.,

Defendants.

Plaintiff, proceeding pro se, filed the original complaint in this action on March 29, 1995. On October 2, 1995, plaintiff filed an amended complaint. Defendants then filed a motion to dismiss, which the court granted on May 14, 1996. The court also granted plaintiff leave to file an amended complaint, which he did on June 14, 1996.

In response to the second amended complaint, defendants moved to dismiss all of plaintiff's claims. Plaintiff opposed defendants' motion, and the court took the matter under submission without oral argument. On September 25, 1996, the court issued an order granting in part and denying in part defendants' motion to dismiss. Five of plaintiff's claims survived: (1) a Title VII claim against the Secretary of

Agriculture; (2) Bivens claims against nine individual federal defendants; (3) defamation claims against the individual federal defendants; (4) invasion of privacy claims against the individual federal defendants; and (5) claims of intentional infliction of emotional distress against the individual federal defendants.

On December 20, 1996, defendants filed a motion to dismiss plaintiff's remaining claims or, alternatively, for summary judgment. Plaintiff opposed defendants' motion and moved for summary judgment against defendants. Defendants then filed a reply to plaintiff's opposition to which plaintiff, without leave of the court, filed a surreply. For reasons stated below, defendants' motion for summary judgment is GRANTED in part and DENIED in part; plaintiff's motion for summary judgment is DENIED.

I

The defendants' FRCP 12(b)(6) motion to dismiss is untimely. This defense must be asserted within the pleadings, in a motion for judgment on the pleadings or at trial. FRCP 12(h)(2). When a motion to dismiss involves matters outside the pleadings, the court must treat the motion as one for summary judgment. FRCP 12(b).

Defendants did not include their motion to dismiss within the pleadings. Moreover, both plaintiff and defendants have filed documents outside the pleadings. The court, therefore, will consider defendants' motion an FRCP 56 motion for summary judgment.

II

Summary judgment is a method for the prompt disposition of an action in which there is no genuine issue of material fact. FRCP 56(c) provides for the granting of summary judgment where the moving party is entitled to judgment as a matter of

law. The burden of establishing that there is no genuine issue of material fact lies with the moving party. Celotex Corp v Catrett, 477 US 317, 322-23 (1986). Once the moving party has that burden by presenting evidence which, if uncontradicted, would entitle it to a directed verdict at trial, FRCP 56(e) shifts to the nonmoving party the burden of presenting specific facts showing that such contradiction is possible. British Airways Bd v Boeing Co, 585 F2d 946, 950-952 (9th Cir 1978).

A party opposing summary judgment may not rest upon the mere allegations or denials of his pleadings. Rather, responses, either by affidavits or as otherwise provided in the rule, must set forth specific facts showing that there is a genuine issue for trial. A mere "scintilla" of evidence supporting the nonmoving party's position will not suffice. The showing must be sufficient for a reasonable jury to find for the nonmoving party. Anderson v Liberty Lobby, Inc, 477 US 242 (1986)

The question at summary judgment is whether reasonable minds could differ over the import of the evidence. Eisenberg v Insurance Co of North America, 815 F2d 1285, 1288 (9th Cir 1987). "If the evidence is merely colorable * * * or is not significantly probative, summary judgment may be granted." Id. The nonmoving party's evidence is to be taken as true and inferences are to be drawn in the light most favorable to the nonmoving party. Id at 1289.

III

Drawing all inferences in favor of plaintiff, the operative facts of this case are as follows. Beginning on August 28, 1988, plaintiff was employed as a mining engineer by the Forest Service. Plaintiff's duties included mineral examination and processing of mineral patent applications. During his employment as a mining engineer, plaintiff

determined that Cecil and Ruby Burton "(the Burtons") did not meet patent requirements and should not be granted their patent application. This finding was later overruled by defendants Sylvia Arbelbide and Hilton Cass who clearlisted the Burtons' claims over plaintiff's objections.

In December 1989, the Forest Service Manual was amended to require that all mineral examiners obtain certification by May 30, 1990. On October 3, 1990, defendants Frederick Mullin, Bob Randolph, Robert Thompson, Rich Harty and Norman Day, members of the certification panel , returned plaintiff's application, stating in their in their Mineral Examiner Certification Review Sheet that his application was not all his work (only 20%) and was completely unsatisfactory anyway." March 29, 1995, Complaint, Exhibit 1. Plaintiff filed an appeal to the Mineral Examiner Certification Panel's decision to withhold his certification as a mineral examiner in November 1990. Plaintiff filed a second appeal on June 7, 1991. On March 2, 1993, H.M. Montrey, Associate Deputy Chief of the Forest Service, upheld the determination of the Mineral Examiner Certification Panel. On March 3, 1993, Plaintiff received a letter that his position would no longer be funded.

Based on these events, plaintiff filed claims for: (1) employment discrimination in violation of Title VII, 42 USC § 2000e-16; (2) Claims under the Federal Tort Claims Act ("FTCA"), 28 USC § 2671; (3) claims under the False Claims Act ("FCA"), 31 USC § 3729; (4) Bivens claims based on violation of the Eleventh and Fifth Amendments of the Constitution; and (5) state law claims of defamation, invasion of privacy, and intentional infliction of emotional distress. On September 5, 1996, the court dismissed plaintiff's FTCA claims and his FCA claims.

IV

The court will first consider plaintiff's Title VII race discrimination claims. Defendants have moved for summary judgment on these claims, which they accurately characterize as allegations that plaintiff was denied certification due to his Indian national origin because his white supervisors were angered that he was disallowing mining claims to white Americans. Although it is questionable whether such an allegation of "in-group/out-group" discrimination can even support a claim under Title VII, the court will consider the allegation according to the framework established by McDonnell Douglas Corp v Green , 411 US 792, 802 (1973), and its progeny:

First, the plaintiff has the burden of proving by a preponderance of evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Third, should the defendant carry this burden the plaintiff must then have opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons but a pretext for discrimination.

Texas Dep't of Community Affairs v Burdine, 450 US 248, 252-53 (1981) (citations omitted) (internal quotes in original); see also St Mary's Honor Center v Hicks, 509 US 502 (1993).

A plaintiff may establish a prima facie case of race discrimination with direct evidence of discriminatory intent or statistical proof of a pattern of discrimination. Wilson v AAA Plumbing Pottery Corp, 344 F3d 1024, 1027 (11th Cir 1994). Alternatively, a plaintiff may establish a prima facie case by demonstrating the following elements:
(i) that he belongs to a racial minority;

(ii) that he applied and was qualified for a job for which the employer was seeking applicant; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.
McDonnel Douglas Corp, 411 US at 802.

A

Because plaintiff has offered no direct evidence of discriminatory intent or evidence of statistical disparity, he must establish the four elements of McDonnel Douglas to withstand summary judgment. Assuming arguendo that plaintiff can demonstrate the first three elements, he cannot succeed on the fourth.

Since McDonnel Douglas, the Ninth Circuit has found the fourth element of a prima facie case satisfied when a plaintiff shows "that employer sought a replacement with similar qualifications to his own, thus demonstrating a continued need for the same services and skills." Sengupta v Morrison-Knudsen Co, 804 F2d 1072, 1075 (9th Cir 1986) (quoting Loeb v Textron, Inc, 600 F2d 1003, 1013 (1st Cir 1979)). While there is some debate whether a plaintiff must show that he was replaced by someone outside his class, there is no dispute that a plaintiff must show that his employer has looked for someone to take his place. Plaintiff here has introduced no evidence that his employer sought or is currently seeking to replace him.

Plaintiff only alleges that his duty to review mineral reports was assumed by his superior, Hilton Cass, after plaintiff failed to receive certification. Hilton Cass did not replace plaintiff or any other employee, but simply assumed new responsibilities. Moreover, plaintiff has presented no evidence that his position remained open or that the Forest Service is seeking applicants with plaintiff's qualifications.

Plaintiff has thus failed to raise an inference that the employment decision on impermissible racial discrimination. Accord Crum v American Airlines, Inc, 946 F2d 423, 428 (5th Cir 1991) (upholding the district court's finding that plaintiff had not presented sufficient evidence for a prima facie case by showing that his employer "eliminated [plaintiff's] position and replaced with his own staff"). Accordingly, the court GRANTS defendants' motion for summary judgment on plaintiff's Title VII claim.

V

A

Defendants have also moved for summary judgment on plaintiff's Bivens claims based on statute of limitations grounds. The appropriate statute of limitations for a Bivens claim is the statute of limitations for personal injury claims in the statute where the Bivens claims occurred. Van Strum v Lawn, 940 F2d 406, 410 (9th Cir 1991). Under California law, section 1983 claims are governed by California Code of Civil Procedure § 340(3), which provides for a limitation period of one year from the date of cause of action accrues. McDougal v County of Imperial, 942 F2d 668, 672 (9th Cir 1991). Because "[a]ctions under § 1983 and those under Bivens are identical save for the replacement of a state actor under § 1983 by a federal actor under Bivens," Van Strum, 949 F2d at 409, section 340(3) is applicable to plaintiff's Bivens claims as well. Plaintiff's Bivens claims are thus subject to a one year statute of limitations.

B

The Nith Circuit, considering § 1983 claims, found that a cause of action "accrue[s] when the plaintiff knows or has reason to know of the injury which is the basis of the action."

Norco Constr, Inc v King County, 801 F2d 1143, 1145 (9th Cir 1986).

While plaintiff's Bivens claims are based on violations of due process , the precise factual basis for these claims is not clear on the face of his complaint. Plaintiff, therefore, is given leave to amend his complaint, not later than May 9, 1997, to make the factual basis of his Bivens claims clear.

Should defendants wish to bring renewed motions for summary judgment based on statute of limitations grounds, they must state when plaintiff knew or should have known of his Bivens claims and provide evidence that demonstrate such knowledge.

VI

Defendants have also moved for summary judgment on plaintiff's state law claims. Plaintiff's state claims may be read to allege tort claims for defamation, invasion of privacy, and intentional infliction of emotional distress against the individual federal defendants other than the Secretary of Agriculture. See September 5, 1996 Order at 9. The United States Attorney has certified that the alleged wrongful activities of the individual defendants fell within the scope of their employment, as he is authorized to do so under CFR § 15.3(a).

A

The Ninth Circuit recently considered a similar certification by the Attorney General in response to common law tort claims against government employees and officials in Billings v United States, 57 F3d 797 (9th Cir 1995). There the court found that such certification was prima facie evidence that a federal employee's actions fell within the scope of employment and was "conclusive unless

challenged." Id at 800. Plaintiff thus bears the burden of rebutting the prima facie evidence of immunity which the certification creates. See Green v Hall, 8 F3d 695, 698 (9th Cir 1993) ("[T]he party seeking review bears the burden of disproving the Attorney General's decision to grant or deny scope of employment certification by a preponderance of evidence"); Schrob v Catterson, 967 F2d 929, 936 (3rd Cir 1992) ("[A] plaintiff challenging the certification has the burden of coming forward with specific facts rebutting it").

Whether a federal employee acted within the scope of his employment turns on the respondent superior principles of the state in which the alleged tort occurred. Pelletier v Federal Home Loan Bank, 968 F2d 865, 876 (9th Cir 1992). In California, the inquiry focuses on whether the alleged misconduct occurred while the defendant was carrying out his "employer's business". Perez v Groningen & Sons, Inc, 227 Cal Rptr 106, 110 (Cal 1986).

Plaintiff contends that defendants were acting outside the scope of their federal employment because their actions were illegal, unconstitutional and prohibited by the False Claims Act. Rather than offering specific facts in his opposition to the Attorney General's certification, plaintiff refers only to his pending claims against the defendants. Nowhere does plaintiff allege that the defendants acted outside the scope of their employment. Moreover, plaintiff's allegations of defamation, invasion of privacy, and intentional infliction of emotional distress all involved communications between the defendants or between the defendants and plaintiff. Plaintiff has provided no evidence that these communications between federal employees were outside the scope of their employment. Accordingly, the court finds the Attorney General's certifications valid.

B

The FTCA provides that

[u]pon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto and the United States shall be substituted as the party defendant.

28 USC § 2679(d)(1). Accordingly, the court construes plaintiff's state law tort claims against the defendants as claims against the United States and GRANT the individual defendants' motion for summary judgment.

VII

A

The court will next consider whether the United States is entitled to summary judgment on plaintiff's state tort claims. The FTCA provides an exclusive remedy for personal injury claims arising out of the "wrongful act or omission of any employee of the Government while acting within the scope of his * * * employment" and it precludes "any other civil action." 28 USC § 2679(b)(1). Thus plaintiff's state law claims for defamation, invasion of privacy and intentional infliction of emotional distress against the United States must be brought under the FTCA. Since the court has already dismissed plaintiff's FTCA claim of defamation against the United States in the September 5, 1996 order, it must GRANT summary judgment for the United States bon plaintiff's FTCA claim of defamation at this time.

B

The court cannot reach any conclusion with respect to plaintiff's claims for invasion of privacy and intentional infliction of emotional distress since the substance of these claims is unclear from the pleadings and the documents presented to the court. Accordingly, the court DENIES both plaintiff's and defendants' motion for summary judgment on these FTCA claims against the United States. The court GRANT plaintiff leave to amend his complaint to make clear the basis for his claims of invasion of privacy and intentional infliction of emotional distress.

Plaintiff is reminded that to avoid dismissal of his remaining claims, he must comply with the "short and plain statement" rule of FRCP 8(a)(1). Plaintiff shall amend his complaint to make clear the basis for his Bivens claims and his claims of invasion of privacy and intentional infliction of emotional distress no later than May 9, 1997. He shall not, however, make any new allegations without leave of the court. See FRCP 15(a).

IT IS SO ORDERED.

/s/- VAUGHN R. WALKER
VAUGHN R. WALKER
United States District Judge

Appendix- 9

FILED
SEP 25 1996

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DILIP K. PAUL

Plaintiff,

No. C-95-1096-VRW

v.

ORDER

DAVID FREDLEY, et al.,

Defendants.

Pending before the court is plaintiff's motion for leave to file a motion for reconsideration of court's September 5, 1996 order. Specifically, plaintiff challenges part II-B of the order, which dismisses plaintiff's claims under 31 USC § 3730(h). For the following reasons, plaintiff's motion is DENIED.

I

Civil Local Rule 7-9(b) sets forth the requirements for a motion for leave to file a motion for reconsideration:

The moving party must specifically show:

(1) That at the time of the motion for leave, a material difference in fact or law exists from that which was

presented to the court before entry of the interlocutory order for which reconsideration is sought. The party shall also show that in the exercise of reasonable diligence the party applying for reconsideration did not know such fact or law at the time of the interlocutory order; or

(2) The emergence of new material facts or a change of law occurring after the time of such order; or

(3) The manifest failure by the court to consider material facts which were presented to the court before such interlocutory order.

II

Plaintiff argues that the court erred by concluding that the Civil Service Reform Act, 5 USC §§ 1213, or 2302, provides the sole grounds, if any, for relief to federal employees who suffer retaliation as a result of whistle blowing. In support of this contention, plaintiff argues that 5 USC § 2302 is more restrictive than 31 USC § 3730(h) , as evinced by the fact that the Special Counsel to the Merit Systems Protections Board denied his claims under 5 USC § 2302. This argument does not " specifically show" that material facts were omitted despite plaintiff's due diligence, that new material fact or law has emerged since the order was issued, or that the court failed to consider material facts introduced in the earlier filing. Nor does this argument contradict the court's conclusion that federal employees cannot assert claims under 31 USC § 3730(h). See Daly v Dep't of Energy, 741 F Supp 202, 205 (D Colo 1990)

Accordingly, the court need not consider plaintiff's restatement of his claims under 31 USC § 3730(h), and his leave to file a motion for reconsider is DENIED.

IT IS SO ORDERED.

/s/- VAUGHN R. WALKER
VAUGHN R. WALKER
United States District Judge

Appendix- 10

FILED
SEP - 5 1996

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DILIP K. PAUL

Plaintiff,

v.

No. C-95-1096-VRW
ORDER

DAVID FREDLEY, et al.,

Defendants.

Plaintiff, proceeding pro se, filed the original complaint in this action on March 29, 1995. Plaintiff then filed an amended complaint on October 2, 1995. Defendants subsequently filed motion to dismiss, which the court granted on May 14, 1996. The court also granted plaintiff leave to file an amended complaint, however, which he did on June 14, 1996.

In fact, plaintiff simultaneously filed two amended complaints. The first was filed by the clerk and realleges claims under Title VII, Federal Tort Claims Act (FTCA), the False Claims Act, 31 USC § 3730(h), Constitutional violations against individual defendants under Bivens v Six Unknown Named Agents, 403 US 388 (1971), and various state law claims. In the second, which plaintiff sought to

have filed under seal, plaintiff seeks to initiate a qui tam action under the False Claims Act, 31 USC § 3730(b) (the "FCA Complaint"). The clerk received this document, but has not filed it, under seal or otherwise, pending the court's evaluation of the propriety of such an action.

Defendants have moved to dismiss all of plaintiff's claims. Plaintiff opposed defendants' motion, and the court took the matter under submission without oral argument. For the reasons described below, the court GRANTS defendants' motion in part.

I

A FRCP 12(b)(6) motion to dismiss tests the legal sufficiency of the claim or claims stated in the complaint. The complaint must be construed in the light most favorable to the plaintiff. Russell v Landrieu, 621 F2d 1037, 1039 (9th Cir 1980). The court must accept as true all material allegations in the complaint, as well as all reasonable inferences to be drawn from these facts. NL Indus, Inc, v Kaplan, 792 F2d 896, 898 (9th Cir 1986). Material allegations must be accepted as true no matter how improbable they may seem and without regard to any potential difficulties in proof. Allison v California Adult Authority, 419 F2d 822, 823 (9th 1969).

The court need not however, accepts as true allegations that contradicts properly subject to judicial notice, Mullis v United States Bankruptcy Court, 828 F2d 1385, 1388 (9th Cir 1987), that are conclusionary or mere legal conclusions, that are unwarranted deductions of fact or unreasonable inferences, Clegg v Cult Awareness Network, 18 F3d 618, 624 (9th Cir 1981), or that are contradicted by exhibits to the complaint, Durning v First Boston Corp, 815 F2d 1265, 1267 (9th Cir 1987). Even so, the motion may not be granted "unless it appears beyond doubt that the plaintiff can prove

no set of fact in support of his claim which would entitle him to relief." Conley v Gibson, 355 US 41, 45-46; Moore v City of Costa Mesa, 886 F2d 260, 262, (9th Cir 1989).

II

A

Defendants' first ground for dismissing plaintiff's amended complaints is that they were untimely filed. In its prior order of dismissal, entered May 14, 1996, the court stated, "Plaintiff's complaint is DISMISSED WITH LEAVE TO AMEND within 30 days in a manner consistent with this order." Order at 10. Plaintiff filed his amended complaint June 14, 1994, 31 days after entry of that dismissal order.

Plaintiff argued that the amended complaints were not untimely filed. Plaintiff states that under FRCP 6(e), he was entitled to an extra three days to file because the court served the order by mail. FRCP 6(e) provides as follows:

Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, 3 days shall be added to the prescribed period.

The court's order of May 14 did not explicitly give plaintiff a date certain by which to file his amended complaint. As such, and in light of plaintiff's pro se status, the court finds plaintiff entitle to rely on the extension provided by FRCP 6 and DENIES defendants' motion on this ground.

B

Defendants have moved to dismiss plaintiff's Title VII claims against all defendants except the Secretary of Agriculture. The court's order of May 14 explicitly

dismissed the this claims against all the then-named defendants, but allowed plaintiff leave to amend to the name of the Secretary. Order at 4. Plaintiff's amended complaint names the Secretary, but also purports again to implicate other individual defendants. As previously found by the court, these defendants may not be so named. Accordingly, to the extent plaintiff's amended complaint purports to be alleging Title VII claim against defendants other than the Secretary of the Agriculture, defendants' motion is GRANTED, and those claims are DISMISSED.

C

Defendants attack plaintiff's amended FTCA claim on two grounds. First, as with Title VII claim, defendants note that plaintiff has failed to adhere to the court's prior order and has alleged this claim against defendants other than the United States. Plaintiff responds that he has properly alleged that the defendants were acting outside the scope of their employment and thus under 28 USC §§ 2679(b)(1) and (b)(2), he is entitled to bring state law tort claims and constitutional claims against these defendants. See Order at 5 n2.

This may well be so. The argument, however, has no bearing on plaintiff's entitlement to bring an FTCA claim against individual defendants. That he may not do. 28 USC § 2679. Accordingly, to the extent plaintiff purports to be alleging FTCA claims against any other defendants besides the United States, defendants' motion to dismiss is GRANTED. Plaintiff's FTCA claims against defendants other than the United States are DISMISSED.

Second, defendant United States attacks plaintiff's FTCA claim against it on the ground that 28 USC § 2680(h) precludes libel and slander claims. Defendant contends that the "gist" of plaintiff's complaint is that the government employees reviewing a mineral report written by plaintiff

made defamatory statements regarding plaintiff and denied him certification as a mineral examiner. Motion at 4.

Plaintiff does not argue that defendants' characterization of his claim is incorrect. Instead, plaintiff argues that § 2680(h) has no application to claims brought against federal employees for violation of the constitution or federal law. Plaintiff is correct, see order at n2, but again the argument is irrelevant to this FTCA claim against the United States.

The court has reviewed the allegations of plaintiff's amended complaint. As to plaintiff's FTCA claim against the United States, defendant's characterization of the claim as one of defamation is accurate. Accordingly, as plaintiff's FTCA claim against the United States is barred by 28 USC § 2679(h), it is dismissed.

D

Plaintiff seeks to pursue two types of False Claims Act claims. First plaintiff alleges a claim under 31 USC § 3730(h), apparently in both his amended complaints, for retaliation against him for his involvement with a False Claim action. As stated in the court's prior order, § 3730(h) provides as follows:

"Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under [§ 3730], including investigation for, initiation of, testimony for, in an action filed or to be filed under this section shall be entitled to all relief necessary to make the employee whole. * * * An employee may bring an action in the appropriate district

court of the United States for the relief provided in this subsection."

Federal employees, however, are not entitled to pursue such an action against their employer, of course, the United States Government. Daly v United States Department of Energy, 741 F Supp 202, 204-05 (D Colo 1990). Instead, the provisions of the Civil Service Reform Act, 5 USC §§ 1213, 2302, provide the sole remedy for a federal employee in plaintiff's circumstances. Accordingly, plaintiff's claim under 31 USC § 3730(h) is DISMISSED.

Second, plaintiff seeks to bring a Federal [False] Claims Act on behalf of the United States against the named United [States] Forest Service employees and one George Burton, who is alleged to be a person pursuing mining claims not properly patentable under federal law. In short, plaintiff alleges that he discovered that the false statements had been made in the patent application, that he reported these misrepresentations to the Forest Service employees and that all defendants participated in a conspiracy to deny plaintiff his certification as a mineral examiner in an effort to prevent the disclosure of these misrepresentations and in retaliation for plaintiff's discovery of the patent application defects. Amended Complaint, ¶¶ 4-30.

Defendants first argue that plaintiff has not identified the mining claimants at issue. This is incorrect, as noted above. Defendants further argue that plaintiff has not alleged how these claimants have defrauded the United States. The court need not reach this issue, however, for plaintiff's own allegations defeat his claim. 31 USC § 3730(e)(3) provides as follows:

"In no event may a person bring an action under subsection (b) which is based on allegations or transactions which are the subject of a civil suit or an

administrative civil money penalty suit proceeding in which the Government is already a party."

At paragraph 31 of his amended complaint, plaintiff alleges as follows:

Needless to say, todate [sic], the Department of Interior (DOI) refused to issue any mineral patents, as the conspirators illegally and fraudulently recommended and hoped for. On the contrary, the DOI is in litigation against the claimants on these claims.

Amended complaint, ¶ 31. This alone precludes plaintiff from pursuing his 31 USC § 3730(b) False Claims Act claim.

Accordingly, plaintiff's § 3730(b) false Claim Act is DISMISSED.

E

Plaintiff has also alleged Bivens claims against the individual federal defendants based on alleged deprivations of plaintiff's due process rights under the Fifth Amendment. Defendants assert that plaintiff has failed adequately to link each named defendant to a constitutional violation, has failed to meet the heightened pleading standard for intent under **Branch v Tunnel,** 14 F3d 449 (9th Cir 1994), and had failed adequately to plead facts establishing personal jurisdiction over certain nonresident defendants.

Before reaching these arguments, however, which upon initial review would not appear sufficient as argued to defeat plaintiff's claim, the court has an additional concern not raised by the parties namely, whether plaintiff, as a federal employee, is entitled to pursue a Bivens action for this alleged type of wrongdoing. See e. g., United States v

Fausto, 484 US 439 (1988); Bush v Lucas, 462 US 367 (1983); Karamanos v Egger, 882 F2d 447 (9th Cir 1989). As explained in the remainder of this order, however, as the case will be going forward against all defendants, the court sees little benefit to receiving additional briefing on this issue at this time. Instead, defendants are invited to raise this issue, along with the elements already made, and to the extent applicable the defense of qualified immunity, in a later dispositive motion.

Accordingly, defendants' motion to dismiss plaintiff's Bivens claims is DENIED WITHOUT PREJUDICE.

F

Plaintiff's claims may also be read fairly to allege state law tort claims, for among other things defamation, invasion of privacy, and intentional infliction of emotional distress against the individual federal defendants apart from the Secretary of Agriculture. Defendants have not moved to dismiss these claims. In addition, the court's review of the record does not reveal any certification of the Attorney General that alleged wrongful activities of the individual defendants fell within the scope of their employment such that the exclusive remedy for these claims would be under the FTCA. Accordingly, these claims may proceed.

III

For the foregoing reasons, the court ORDERS as follows:

(1) The clerk is INSTRUCTED to file plaintiff's False Claims Act complaint.
(2) Defendant's motion to dismiss is GRANTED in part and DENIED in part.
(3) The parties are ORDERED to appear for a case management conference on September 27, 1996, at 10:30 am.

IT IS SO ORDERED.

/s/- VAUGHN R. WALKER
VAUGHN R. WALKER
United States District Judge

Appendix-11

FILED
MAY 14 1996

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DILIP K. PAUL

Plaintiff,

No. C-95-1096-VRW

v.

ORDER

DAVID FREDLEY, et al.,

Defendants.

Plaintiff, proceeding pro se, filed the original complaint in this action on March 29, 1995. Plaintiff then filed an amended complaint on October 2, 1995. The parties subsequently entered into a stipulation allowing defendants until November 2, 1995, to file an answer or other response to plaintiff's amended complaint. On October 10, 1995, defendants filed a motion to dismiss. On October 27, 1995, defendants filed an amended motion to dismiss.

On October 30, 1995, plaintiff filed a motion for default judgment. This motion was followed by two additional cross-motions by plaintiff, filed October 31, 1995, and November 17, 1995. On December 1, 1995, defendants filed

a reply memorandum. On December 11, 1995, the response to defendants' reply brief filed another cross-motion.

On December 19, 1995, plaintiff filed a motion pursuant to FRCP 15(c) to amend his complain. On January 2, 1996, plaintiff filed yet another cross-motion. On January 3 1996, defendants filed an opposition to plaintiff's motion to amend and latest cross-motion, against which plaintiff filed one more cross-motion on January 23, 1996.

For the reasons discussed below, the court DENIES plaintiff's motion for default and DISMISSES WITH LEAVE TO AMEND plaintiff's complaint.

I

Plaintiff entered into a stipulation with defendants allowing them until November 2, 1995, to file an answer or otherwise to respond to his complaint. Defendants responded with a motion to dismiss prior to November 2, 1995. Plaintiff's motion for default is thus without merit and is DENIED.

II

A FRCP 12(b)(6) motion to dismiss tests the legal sufficiency of the claim or claims stated in the complaint. The complaint must be construed in the light most favorable to the plaintiff. Russell v Landrieu, 621 F2d 1037, 1039 (9th Cir 1980). The court must accept as true all material allegations in the complaint, as well as all reasonable inferences to be drawn from these facts. NL Indus, Inc, v Kaplan, 792 F2d 896, 898 (9th Cir 1986). Material allegations must be accepted as true no matter how improbable they may seem and without regard to any potential difficulties in proof. Allison v California Adult Authority, 419 F2d 822, 823 (9th 1969).

The court need not however, accepts as true allegations that contradicts properly subject to judicial notice, Mullis v United States Bankruptcy Court, 828 F2d 1385, 1388 (9th Cir 1987), that are conclusionary or mere legal conclusions, that are unwarranted deductions of fact or unreasonable inferences, Clegg v Cult Awareness Network, 18 F3d 618, 624 (9th Cir 1981), Western Mining Council v Watt, 643 F2d 618, 624 (9th Cir 1981), or that are contradicted by exhibits to the complaint, Durning v First Boston Corp, 815 F2d 1265, 1267 (9th Cir 1987). Even so, the motion may not be granted "unless it appears beyond doubt that the plaintiff can prove no set of fact in support of his claim which would entitle him to relief." Conley v Gibson, 355 US 41, 45-46; Moore v City of Costa Mesa, 886 F2d 260, 262, (9th Cir 1989).

III

Plaintiff's amended complaint names nine individuals and the United States Forest Service as defendants. Plaintiff asserts claims under Title VII, 42 USC § 2000e-16, the Federal Tort Claims Act, 28 USC § 2671, the False Claims Act, 31 USC § 3730, apparent Bivens[1] claims and California State law claims. Defendants have moved on various grounds to dismiss each of plaintiff's claims.

With regard to plaintiff's Title VII claim, the proper defendant in civil action brought by federal employees under Title VII is the head of the employee's department, agency or unity. Johnson v Horne, 875 F2d 1415, 1418-19 (9th Cir 1989), overruled on other grounds, see Williams-Scaife v Dep't of Defense Dependent Schools, 925 F2d 346, 348 n4 (9th Cir 1991); Hancock v Egger, 848 F2d 87, 88-89 (6th

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[1] See Bivens v Six Unknown Named Agents, 403 US 388 (1971)

Cir 1988). The relevant department for plaintiff is the Department of Agriculture, and the appropriate dependant is the Secretary of the Department of Agriculture. Plaintiff's amended complaint does not name the Secretary of Agriculture as a defendant. Accordingly, this claim is DISMISSED as to the independent defendants and DISMISSED WITH LEAVE TO AMEND to name the correct defendant for this claim.

In filing his amended complaint, plaintiff should also ensure that his allegations are adequate to establish venue in the Northern District of California. Pursuant to 42 USC § 2000e-16(d), venue in Title VII cases such as plaintiff's is established by demonstrating the following:

[A]n action may be brought in any judicial district in the state in which the unlawful practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice.

42 USC § 2000e-5(f)(3); Johnson v Payless Drug Stores Northwest, Inc., 950 F2d 586, 587 (9th Cir 1991). It appears from plaintiff's papers that the alleged wrongful activity that serves as the basis for plaintiff's Title VII claim occurred in California. Venue in the Northern District would thus appear proper; plaintiff, however, must allege facts to this end in his amended complaint.

B

With regard to plaintiff's FTCA claim, the United States is the only proper defendant to an FTCA claim. 28 USC § 2679(b)(1). Plaintiff has not named the United States as a defendant to this action. Accordingly, plaintiff's FTCA

claim is DISMISSED WITH LEAVE TO AMEND to add the proper defendant, and plaintiff's FTCA claims against the nine individual defendants are DISMISSED.[2]

Defendants further assert that plaintiff has failed to exhaust his administrative remedies as required under FTCA, thus mandating dismissal of his claim. See 28 USC § 2675(a); Jervis v United States, 966 F2d 517, 519 (9th Cir 1992); Gillespie v Civiletti, 629 F2d 637, 640 (9th Cir 1980); see also 28 CFR 14.2(a). Plaintiff contests this argument. As defendants rely on evidence outside of the pleadings to support their argument, the court will not rule at this time whether plaintiff has adequately exhausted. In his amended complaint, however, plaintiff should include specific, detailed allegations demonstrating his fulfillment of the exhaustion requirement.

In addition, defendants have challenged plaintiff's allegations as insufficient to establish venue in the Northern District of California for this claim. Under 28 USC § 1402(b), venue over actions brought against the United States under § 1346(b) is proper in the district where plaintiff resides or in the district in which the tort occurred. The court's review of the papers submitted by plaintiff in this matter reveals that plaintiff appears to be a resident of the Northern District of

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[2]The FTCA will not preclude plaintiff from suing individual defendants for state law torts committed outside the scope of their employment, for constitutional violations or for violations of federal statutes that authorize actions against the individuals. See 28 USC §§ 2679(b)(1), (b)(2). Plaintiff's state law tort and constitutional claims, i. e., his Bivens claims, are addressed in sections II(D, E), infra. Beyond the other statutory grounds addressed in this order, however, plaintiff does not assert claims against the individual defendants under any other federal statute.

California, and thus would appear proper. In this amended complaint, plaintiff should include allegations to this effect.

C

Plaintiff also appears to be bringing claims under the False Claims Act, 31 USC § 3729. The False Claims Act does not provide a cause of action for an individual to sue an agency; rather, it provides a cause of action for the United States against those that have defrauded it and allows, in certain circumstances, a private individual to bring the civil action on behalf of the United States. See 31 USC § 3730(b).

In this case, plaintiff does not purport to be bringing suit on behalf of the United States nor has he complied with the extensive procedural requirements of § 3730 for bringing such a suit. Instead, plaintiff purports to be bringing a false claims action under 31 USC § 3730(h), which provides in relevant part as follows:

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under [§ 3730], including investigation for, initiation of, testimony for, or assistance in action filed or to be filed under this section shall be entitled to all relief necessary to make the employee whole. * * * An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

Plaintiff's amended complaint contains no specific, nonconclusionary allegations regarding any retaliation against him for his involvement in a False Claims action brought by him, the United States or any other party. Accordingly, this claim is DISMISSED WITH LEAVE TO AMEND.

D

Plaintiff's remaining federal claims are for constitutional violation of the Eleventh and Fifth Amendments. The United States can only be sued to the extent that it has waived its sovereign immunity, United States v Testan, 424 US 392 (1976), and , except as provided by the FTCA, the United States has not waived sovereign immunity for this type of claim. A private right of action, however, may be implied from the Constitution itself for allegations of constitutional violations made against federal employees or their agents. Bivens, 403 US at 392-97. Such an action against individual officials, not the United States. Gilbert v DaGrossa, 756 F2d 1455 (9th Cir 1985). Accordingly, plaintiff's constitutional violation claims may only be asserted against the individual defendants and are properly characterized as Bivens claims.

To state a Bivens claim, a plaintiff must allege two essential elements: (1) violation of a right secured by the constitution or laws of the United States, and (2) commission of the alleged deprivation by a person acting under color of federal law. See Van Strum v Lawn, 940 F2d 406, 409 (9th Cir 1991).

Plaintiff's allegations under the Eleventh Amendment fail to state a claim. The eleventh Amendment provides that the "Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state, or by citizens or subjects of any Foreign State." None of the parties to this action is a state, nor do the Eleventh Amendment's immunity protections appear to have any relevance to plaintiff's claim. Accordingly, this claim is DISMISSED.

Plaintiff also appear to assert claims for violations of his Fifth Amendment rights. Plaintiff alleges that defendants libeled and slandered plaintiff, violated his privacy rights, interfered with his employment by denying him jobs and promotional opportunities within the Forest Service by reassigning him to San Francisco, and intentionally inflicted mental distress-- all in alleged retaliation for plaintiff's alleged whistleblowing activities.

Plaintiff's claims are deficient in several ways. Plaintiff allegations are largely conclusionary, and thus need not be accepted as true for this motion, appear, except perhaps those relating to his employment, largely to be common law torts, rather than constitutional violations, and , dispositively, fail adequately to link each of the named to defendants to the alleged constitutional violations. As such, these allegations are insufficient to state a claim. See Conley v Gibson, 355 US 41, 47 (1957); FRCP 8(a).

Accordingly, the court DISMISSES WITH LEAVE TO AMEND plaintiff's Fifth Amendment Bivens claims. In his amended complaint, plaintiff should allege the specific facts necessary to demonstrate constitutional violations and to link the individual defendants directly to the alleged violations. Plaintiff is further advised to review Branch v Tunnel, 14 F3d 449 (9th Cir 1994), as he must satisfy a heightened pleading standard for those constitutional violations for which intent is an element.

In light of the foregoing disposition of this claim, the court need not address defendants' personal jurisdiction argument. Plaintiff, however, is advised to ensure that his amended complaint adequately alleges facts demonstrating that this court has personal over each of the named individual defendants.

Plaintiff's remaining claims are for alleged state law torts. As plaintiff no longer has any federal claims pending before the court, the court declines at this time to exercise supplemental jurisdiction over these claims. 28 USC § 1367 (c)(3); Schneider v TRW, Inc, 938 F2d 986, 993-94 (9th Cir 1991). These claims are therefore DISMISSED WITHOUT PREJUDICE. Accordingly, the court need not at this time any of the substantiative defenses put forward by the defendants with regard to these claims, including determination of which claims might fall within or without the reach of the FTCA.

IV

For the foregoing reasons, the court ORDERS as follows:
(1) Plaintiff's motion for default is DENIED
(2) Defendants' motion to dismiss is GRANTED.

Plaintiff's complaint is DISMISSED WITH LEAVE TO AMEND within 30 days in a manner consistent with this order. In his amended complaint plaintiff should avoid generalized reliance on citations to voluminous exhibits; rather plaintiff should allege, in a simple and concise manner, the facts, not legal conclusions, that support his claims against each defendant. Plaintiff may then include specific citations to exhibits as appropriate to support these allegations.[3]

Should plaintiff fail timely to amend, his complaint will be dismissed.

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[3]In this regard, plaintiff need not resubmit any exhibit already lodged with the court, but may instead cite, as appropriate, to exhibits submitted previously.

IT IS SO ORDERED.

/s/- VAUGHN R. WALKER
VAUGHN R. WALKER
United States District Judge

Appendix-12

FILED
SEP 27 1995

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DILIP K. PAUL

Plaintiff,

No. C-95-1096-VRW

v.

ORDER

DAVID FREDLEY, et al.,

Defendants

Plaintiff, proceeding pro se, filed a complaint in this case on March 29, 1995. At that time, the court issued an order setting a scheduling conference on June 30, 1995, at 9:00 a .m. On June 23, 1995, the court issued an order vacating the scheduling conference and ordering the parties to file scheduling conference statements on or before September 1, 1995. On September 1, 1995, plaintiff and defendants submitted a joint status conference statement. In addition, plaintiff also filed a motion requesting leave to file an amended complaint under FRCP 15.

Plaintiff has the right to amend his complaint once as a right until responsive pleadings are filed. FRCP 15(a). No responsive pleadings have been filed in this case. Accordingly, plaintiff may file amended complaint without leave of the court until such time as responsive pleadings are filed. If plaintiff fails to amend before responsive pleadings are filed, then any subsequent amendment will require leave

of the court. Plaintiff is reminded that should he choose to file an amended complaint, the amended complaint must reproduce the entire complaint, not just desired amendment, and may not incorporate any part of the prior complaint by reference. SE LR 10-1. For this reason, the section of plaintiff's motion for leave to amend that purports to be the amendment will not be treated as such by the court.

IT IS SO ORDERED.

sd- VAUGHN R. WALKER
VAUGHN R. WALKER
United States District Judge

Appendix-13

31 USC § 3730(b)(2) states,

"A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. the government may elect to intervene and proceed with the action within 60 days after it received both the complaint and material evidence."

Appendix-14

28 USC § 1291 Final decision of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all **final** decisions of the district courts of the United States, the United States District Court for the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where direct review may be head in the Supreme Court. the jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1992(c) and (d) and 1295 of this title.